

7480  
No. 11658

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

GLENS FALLS INDEMNITY COMPANY, a  
Corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COM-  
PANY, a Corporation,

Appellee.

---

Transcript of Record

---

In Two Volumes

Volume I

Pages 1 to 432

---

FILED  
SEP - 10 1947  
PAUL P. O'BRIEN,  
CLERK

Upon Appeal from the District Court of the United States  
for the Southern District of California  
Central Division

---



No. 11658

---

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

GLENS FALLS INDEMNITY COMPANY, a  
Corporation,  
Appellant,  
vs.  
BASICH BROTHERS CONSTRUCTION COM-  
PANY, a Corporation,  
Appellee.

---

Transcript of Record

---

In Two Volumes  
Volume I  
Pages 1 to 432

---

Upon Appeal from the District Court of the United States  
for the Southern District of California  
Central Division

## INDEX

PAGE

## Bill of Particulars—(Continued) :

VII—Equipment Rental Fully Operated 2/12/45 to 5/19/45 ..	59
VIII—Equipment Rental Not Fully Operated 3/29/45 to 6/9/45	61
IX—Equipment Rental Royalty Basis .....	62
X—Equipment Rental Fully Operated 2/12/45 to 5/19/45. Not Fully Operated 5/9/45 to 6/10/45 .....	62
XI—Equipment Rental Fully Operated by Basich Bros. 2/21/45 to 6/6/45 .....	66
XII—Equipment Rental Fully Operated 4/6/45 to 4/24/45 ...	68
XIII—Equipment Rental Not Fully Operated 4/24/45 to 6/9/45	68
XIV—Equipment Rental Not Fully Operated 4/6/45 to 5/8/45 .	69
XV—Equipment Rental Fully Operated 6/9/45 to 9/16/45 ..	69
XVI—Equipment Rental Not Fully Operated 6/9/45 to 9/8/45 .	69
XVII—Equipment Rental Royalty Basis .....	69
XVIII—Equipment Rental Not Fully Operated 6/15/45 to 9/17/45	70

## INDEX

## PAGE

## Bill of Particulars—(Continued):

XIX—Equipment Fully Operated 6/9/45 to 9/6/45 .....	70
XX—Equipment Rental Royalty Basis .....	70
XXI—Equipment Rental Fully Op- erated 6/8/45 to 9/12/45 ..	70
XXII—Equipment Rental Fully Op- erated 6/15/45 to 8/9/45 ..	70
XXIII—Equipment Rental Not Fully Operated 6/9/45 to 9/10/45	70
XXIV—Equipment Rental Not Fully Operated 6/15/45 to 9/8/45	71
XXV—Equipment Rental Not Fully Operated 7/6/45 to 9/17/45	71
XXVI—Repairs Made by Others on Equipment .....	71
XXVII—Parts Purchased for Equip- ment Not Fully Operated 2/14/45 to 6/4/45 .....	71
XXVIII—Parts Taken from Stock .....	72
XXIX—Fuel, Grease, Oil on Equip- ment Not Fully Operated 4/9/45 to 5/31/45 .....	72
XXX—Miscellaneous Labor, Invoices, etc., 2/26/45 to 6/16/45 .....	72

	INDEX	PAGE
Bill of Particulars—(Continued):		
XXXI—Freight on Rented Equipment		74
XXXII—Repairs Made by Others on Equipment Not Fully Op- erated 6/9/45 to 9/10/45 . . .		74
XXXIII—Parts Purchased for Equip- ment Not Fully Operated 6/16/45 to 9/19/45 . . . . .		75
XXXIV—Parts Taken from Stock . . . .		75
XXXV—Fuel, Grease and Oil on Equipment Not Fully Op- erated 6/7/45 to 9/6/45 . . .		75
XXXVI—Miscellaneous Labor, Invoices, etc., 6/7/45 to 9/17/45 . . . . .		75
XXXVII—Freight on Rented Equipment		78
XXXVIII—Production Gravel Base . . . . .		79
XXXIX—Production Gravel Stabilized Base . . . . .		80
XXXX—Production Gravel Embank- ment . . . . .		80
XXXXI—Production Concrete Aggre- gate . . . . .		81
XXXXII—Production Mineral Aggre- gate . . . . .		82
XXXXIII—Production Concrete Aggre- gate for Structures . . . . .		82
XLIV—Miscellaneous Credits . . . . .		83

INDEX	PAGE
Certificate of Clerk .....	222
Complaint for Recovery of Money and on Bond	2
Exhibit A—Subcontract Agreement .....	17
Exhibit B—Subcontract Bond .....	32
Decision and Order for Judgment and Findings .....	186
Exhibits, Defendant:	
A—Letter of 5/3/45 to Duque & Frazzini in Answer to Letter of 5/1/45 .....	876
B—Confirmation of Verbal Agreement Between Mr. N. L. Basich and Duque & Frazzini .....	877
C—Recapitulation of Production Items Mentioned in Article XXIII of the Subcontract Dated 2/7/45 .....	878
D—Schedule of Payments Made by Basich Bros. on Behalf of Duque & Frazzini 2/11/45 to 3/7/45 .....	879
Exhibits, Defendant's, Attached to Kovick Deposition:	
A—Letter of 5/12/45 to Duque & Frazzini	582
B—Letter of 5/12/45 to Duque & Frazzini	583
Exhibits, Plaintiff's:	
No. 1—Subcontract Agreement (Set Out as Exhibit A, Attached to Complaint for Recovery on Page 17) .....	461
No. 2—Subcontract Bond (Set Out as Exhibit B, Attached to Complaint for Recovery on Page 32) .....	461

	INDEX	PAGE
Exhibits, Plaintiff's—(Continued):		
No. 3—Letter to Basich Bros. Co. 3/7/45		462
No. 4—Letter to Duque & Frazzini 4/5/45		463
No. 5—Letter to Duque & Frazzini 4/27/45 .....		464
No. 6—Letter to Mr. Monteleone 5/8/45		467
No. 7—Letter to Mr. J. E. McCall 5/15/45		469
No. 8—Letter to Duque & Frazzini 5/23/45 .....		471
No. 9—Letter to Duque & Frazzini 5/24/45 .....		474
No. 10—Letter to Duque & Frazzini 6/1/45		477
No. 11—Letter to Basich Bros. Co. 6/7/45		479
No. 12—Letter to Duque & Frazzini 6/8/45 and Attached Letter from War Dept. U. S. Engineer Office 6/7/45 .....		482
No. 13—Letter to Duque & Frazzini 6/9/45		491
No. 14—Letter to Glens Falls Ind. Co. 6/11/45 .....		494
No. 15—Letter to Mr. John E. McCall 6/11/45 .....		497
No. 16—Letter to Glens Falls Ind. Co. 6/14/45 .....		500
No. 17—Letter to Basich Bros. Co. 6/23/45		502
No. 18—Letter to Mr. John E. McCall 6/29/45 .....		504
No. 19—Workmen's Compensation Policy		507
No. 20—Construction Contract War De- partment, Form No. 2 .....		541



## INDEX

PAGE

## Exhibits, Plaintiff's—(Continued):

No. 21—Stipulation to Take Deposition of Nick L. Basich .....	556
Deposition of Nick L. Basich.....	558
No. 22—Stipulation to Take Deposition of George W. Kovick .....	611
Deposition of George W. Kovick.....	613
—direct .....	614
—cross .....	668
—redirect .....	672, 673, 677
—recross .....	673, 675, 679
No. 23—Deposition of John H. Bray, Wit- ness, Plaintiff .....	684
No. 24—Deposition of Carson Frazzini ..	754
—direct .....	756
—cross .....	843
—redirect .....	866
Findings of Fact and Conclusions of Law ....	193
Conclusions of Law .....	211
Findings of Fact .....	194
First Amended Answer of Defendant Glens Falls Indemnity Company, a Corporation ..	89
Exhibit No. 1—Registered Letter 4/5/45 .	116
Exhibit No. 2—Letter to Duque & Fraz- zini 4/27/45 .....	117
Judgment .....	212
Letter Dated 10/8/46 from J. E. McCall to Mr. Stephen Monteleone .....	125

	INDEX	PAGE
Memorandum Answering Letter of 10/8/46 . . .		127
Memorandum of Defendant Glens Falls Indemnity Company, a Corporation, Re Plaintiff's Bill of Particulars . . . . .		146
Names and Addresses of Attorneys . . . . .		1
Notice of Appeal . . . . .		215
Notice to Produce . . . . .		84
Request for Admission Under Rule 36 . . . . .		86
Reporter's Transcript of Pre-Trial Hearing ..		224
Reporter's Transcript of Proceedings:		
Oct. 14, 1946, Judge Hall . . . . .		243
Nov. 7, 1946, Judge Yankwich . . . . .		255
Nov. 25, 1946, Judge Yankwich . . . . .		280
Feb. 4, 1947, Judge Yankwich . . . . .		312
Feb. 5, 1947, Judge Yankwich (Partial) ..		440
Statement of Points on Which Appellant Intends to Rely . . . . .		215
Statement of Points on Which Appellant Intends to Rely on Appeal . . . . .		880
Stipulation and Order . . . . .		221
Stipulation—Defendant May File Amended Answer . . . . .		88
Stipulation (Unsigned) Filed 10/14/46 . . . . .		123

INDEX

PAGE

Witness, Defendant:

Vernon, Lawrence H.

—direct ..... 434

—cross ..... 438

Witnesses, Plaintiff:

Basich, Nickola L.

—direct ..... 416

—cross ..... 430

Popovich, George J.

—direct ..... 317

—cross ..... 360

—redirect ..... 401

Woolums, Bart C.

—direct ..... 406

—cross ..... 411

—redirect ..... 415



NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN E. McCALL,  
JOSEPH J. BURRIS,  
458 S. Spring St.,  
Los Angeles 13, Calif.

For Appellee:

STEPHEN MONTELEONE,  
TRACY J. PRIEST,  
714 West Olympic Bldg.,  
Los Angeles 15, Calif.

In the District Court of the United States, Southern  
District of California, Central Division.

No. 5021-PH Civ.

BASICH BROTHERS CONSTRUCTION  
COMPANY, a corporation,  
Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a  
corporation, and ANDREW DUQUE and  
CARSON FRAZZINI, co-partners doing busi-  
ness under the name of DUQUE & FRAZZINI,  
Defendants.

COMPLAINT FOR RECOVERY OF MONEY  
AND ON BOND

Comes now the plaintiff herein and, for cause of  
action against said defendants, and each of them,  
complains and alleges:

I.

That plaintiff, Basich Brothers Construction  
Company now is and, at all times herein mentioned  
was, a corporation of the State of California and  
organized and existing under and by virtue of the  
laws of said state with its principal place of busi-  
ness in the City of Alhambra, County of Los Ange-  
les, State [2\*] of California; that it was, at all

---

\* Page numbering appearing at foot of page of original certified  
Transcript of Record.

times herein mentioned and now is a citizen and resident of the State of California.

II.

That the defendant, Glens Falls Indemnity Company, at all times herein mentioned, has been and now is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, having its principal place of business in the City of Glens Falls, State of New York, and authorized to transact a general bonding business within the states of California and Arizona; that it was, at all times herein mentioned and now is, a citizen and resident of the State of New York.

III.

That at all times herein mentioned said defendants Andrew Duque and Carson Frazzini have been and now are a co-partnership and have been and now are citizens and residents of the State of Nevada, with their principal place of business at Tonopah, State of Nevada.

IV.

That the herein action is between citizens of different states and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$4000.00.

V.

That on or about the 25th day of January, 1945, said plaintiff, Basich Brothers Construction Com-

pany, a corporation, entered into a certain written contract with the United States of America by and through the Engineering Department thereof, for the furnishing of materials and performing of work for the construction of taxiways, warmup and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities necessary at what is known as Davis-Monthan Airfield at or near Tucson, Arizona, said contract being known as [3] No. W-04-353 Eng. 1302 and having job No. Davis-Monthan E.S.A. 210-6, 210-8 and 210-9. That a copy of said contract is not attached hereto for the reason of its voluminous character. That said defendants and each of them know the contents thereof.

## VI.

That on or about the 7th day of February, 1945, said plaintiff, Basich Brothers Construction Company, a corporation, and said defendants, Duque & Frazzini, a co-partnership, entered into a written subcontract for the performance of certain work and the furnishing of certain material as set forth in said subcontract. That the work to be performed and the material to be furnished under said last mentioned contract was essential to the performance by plaintiff Basich Brothers Construction Company, a corporation, of the work required to be performed by it under its said contract with the United States of America. That a copy of said subcontract between plaintiff and said Duque & Frazzini is hereto attached, marked Exhibit "A" and



made a part hereof to the same force and effect as though set out herein at length.

## VII.

That on or about February 20, 1945, and in conformity with the requirements of Article XXIII of said subcontract marked Exhibit "A" and hereto attached, defendant Glens Falls Indemnity Company, a corporation, for a valuable consideration paid to it as a premium, made, executed and delivered to plaintiff within said District of California, Southern District thereof, Central Division, as Surety, and said Duque & Frazzini, as Principal, a certain contract bond in the penal sum of \$101,745.55 for the faithful performance of the work contracted to be done under the terms of said subcontract hereto attached and marked Exhibit "A". A copy of said bond is hereto attached and marked Exhibit "B" and made a part hereof; that on or about [4] March 7, 1945, defendant, Glens Falls Indemnity Company, a corporation, modified in writing said bond marked Exhibit "B" and hereto attached, by adding thereto the following: "It is hereby understood and agreed that the 10 days appearing in paragraph "First" is changed to read "twenty (20) days."

## VIII.

That at all times herein mentioned following the date of the execution and delivery of said bond by defendant Glens Falls Indemnity Company, a corporation, to plaintiff, Basich Brothers Construc-

tion Company, a corporation, as aforesaid, said bond remained in full force and effect and is still in full force and effect, and said plaintiff, at all of said times, duly performed, complied with and fulfilled all of the conditions and stipulations in said bond contained on its part to be performed.

### IX.

That by the terms of Article XII of said subcontract marked Exhibit "A", it is provided, among other things, that said Duque & Frazzini would prosecute said work continuously with sufficient workmen and equipment to insure its completion, and that plaintiff had the right to compel them to move in another plant; it is further provided in Article XXI thereof, among other things, that said Duque & Frazzini would erect two plants, each to produce 800 cubic yards of suitable material a day to be used in connection with said government project; that it is further provided in Article I thereof, among other things, that the provisions of said contract between plaintiff and the United States of America and the plans and specifications therein referred to are made a part of said subcontract marked Exhibit "A" and hereto attached, and that said Duque & Frazzini would furnish all material, supplies and equipment, and perform all labor required of them under said subcontract, a copy of which is hereto attached and marked Exhibit "A", to the satisfaction of the Government's Engineer or other authorized representative of the Government in charge of said project. It is therein

further provided in Article II thereof, that the work shall be commenced not later than February 19, 1945, and shall be completed on or before June 3, 1945. That by the provisions of Article XXV of said subcontract between plaintiff and said Duque & Frazzini, time is expressly made of the essence thereof.

#### X.

That said Duque & Frazzini entered upon the performance of the requirements of their said subcontract with plaintiff, a copy of which is hereto attached and marked Exhibit "A", but failed to prosecute said work therein required of them continuously with sufficient workmen and/or equipment, or to erect two plants each capable of producing 800 cubic yards of suitable material a day. That after commencing work under said contract and, on or about April 5, 1945, said Duque & Frazzini failed to have or thereafter to maintain sufficient workmen and/or sufficient equipment, as in said subcontract marked Exhibit "A" and hereto attached required of them.

#### XI.

That said Duque & Frazzini and/or said Glens Falls Indemnity Company, after said Duque & Frazzini commenced work, as aforesaid, failed and neglected to pay labor, equipment and material bills on account of labor performed and/or materials and/or equipment furnished to them in connection with the performance of their said sub-

contract with plaintiff, and failed to faithfully perform the work and requirements contracted to be done, as aforesaid. That on account of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done as hereinbefore more specifically set forth, plaintiff did, under date of April 5, 1945, by registered mail, notify said defendants and each of them, that the plant of said Duque & Frazzini [6] was not producing 800 cubic yards of suitable material as required by said subcontract, and that they move in additional equipment to insure proper completion of their said subcontract.

## XII.

That said defendants Duque & Frazzini, thereafter continued to work under the said subcontract with plaintiff, and as plaintiff is informed and believes and upon such information and belief alleges, the defendant, Glens Falls Indemnity Company, at all times herein mentioned, through its duly authorized agents and representatives, fully investigated the facts and conditions relative to the default as herein alleged, of said Duque & Frazzini under the terms of the aforesaid subcontract with plaintiff and said contract bond, and was thereby fully advised of all of the facts thereto pertaining.

## XIII.

That on or about April 27, 1945, said Duque & Frazzini having still failed to faithfully perform the work contracted to be done under their said

subcontract with plaintiff, plaintiff did under date of April 27, 1945, by registered mail, notify said defendants, and each of them, of the failure of said Duque & Frazzini to faithfully perform the work required of them, and that plaintiff would make all reasonable efforts, either in attempting to procure sufficient equipment to produce the deficiency in material required of said Duque & Frazzini, as aforesaid, or attempt to procure the deficiency of materials through other sources and make all charges or other reasonable expenses in connection therewith against said defendants.

#### XIV.

That by reason of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done under their said contract with plaintiff, as aforesaid, and at their own expense to furnish all necessary material and perform all necessary labor incidental thereto, it became necessary for plaintiff to furnish necessary labor, material and equipment for the purpose of completing the work contracted to be done by said Duque & Frazzini under their said subcontract with plaintiff; that from the commencement by said Duque & Frazzini of the work required by them under said subcontract with plaintiff on or about February 19, 1945, until the suspension of said work and the abandonment thereof by said Duque & Frazzini on or about June 8, 1945, as herein alleged, by reason of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done under said

subcontract and to, at their own expense furnish all materials, supplies and equipment, and perform all labor as therein required of them, it became necessary for plaintiff to pay and plaintiff did pay certain necessary materials, supplies and equipment used and/or employed by said defendants Duque & Frazzini, during said period commencing on or about February 19, 1945, to on or about June 8, 1945, for the purpose of completing the work contracted to be done by said Duque & Frazzini under said subcontract.

## XV.

That during said period of time from the commencement of said work as aforesaid, to on or about June 8, 1945, plaintiff furnished and paid for necessary labor, materials, supplies and equipment for the performance by said Duque & Frazzini of the requirements imposed on them by their subcontract with plaintiff, the following items: (a) Labor, \$46,053.20; Insurance, \$6529.59; (b) Repairs on Equipment, \$275.51; (c) Parts of Equipment purchased, \$2257.88; (d) Parts of Equipment furnished by plaintiff to said Duque & Frazzini, \$1723.75; (e) Fuel, grease and oil for Equipment, \$732.47; (f) Rental of Equipment by plaintiff to said Duque & Frazzini, fully operated, \$3989.41; (g) Rental of Equipment by plaintiff to said Duque & Frazzini not fully operated, \$2773.86; (h) Rental of Equipment [8] on tonnage basis, \$4191.60; (i) Rental of Equipment by Duque & Frazzini from (1) P.D.O.C. fully operated,

\$6902.37, (2) P.D.O.C. not fully operated, \$261.34, (3) J. G. North & Sons, \$4956.06, (4) A. B. Bonner, \$625.74, (5) Bressi & Bevanda, \$582.72, (6) Industrial Equipment Co., \$176.00; (j) Miscellaneous Labor, \$2104.40; (k) Freight on Equipment, \$326.89. That the above items total \$85,172.63.

## XVI.

That during the period from the commencement of said work by Duque & Frazzini on or about February 19, 1945, to the abandonment thereof, as aforesaid, on or about June 8, 1945, said defendants had earned, under their said subcontract with plaintiff a gross amount of \$48,716.22. That said gross earnings consist of the following items:

Item I: Gravel Embankment, 3000 cubic yards at contract price of \$0.46 a cubic yard, or \$1380.00;

Item II: Gravel, Stab. Base, 7587 cubic yards at contract price of \$0.40 a cubic yard, or \$3034.80;

Item III: Gravel Base Course, 38,407 cubic yards at contract price of \$0.46 a cubic yard, or \$17,667.22;

Item IV: Concrete, aggregate 21,735 cubic yards at contract price of \$1.05 a ton, or \$22,821.75;

Item V: Mineral aggregate 4586 tons at contract of \$0.65 a ton, or \$2980.00;

Item VI: Rock Base, A. C. LaRue, 309 cubic yards, at \$0.46 a cubic yard, or \$142.14;

Item VII: Sand, Seal Coat, 110 tons at \$0.65 a ton, or \$71.50;

Item VIII: Credit, Maintainer, \$525.00;

Item IX: Credit, Labor, \$92.91;

That pursuant to the provisions of Article XI of said subcontract, plaintiff elected to and did apply said gross earnings [9] of \$48,716.22 to the credit of said Duque & Frazzini in payment of all of the above charge items with the exception of Item (a) above being Labor and Insurance, there being a balance due plaintiff thereon on account of the deficiency between the amounts paid out by plaintiff for labor, supplies, materials and equipment, as aforesaid, in the sum of \$85,172.63, and said gross earnings of \$48,716.22, or \$36,456.41.

#### XVII.

That on or about the 8th day of June, 1945, before the completion of the work provided for in their said subcontract with plaintiff, said Duque & Frazzini notified plaintiff in writing that they were suspending their said operations and thereupon and on or about said 8th day of June, 1945, without the consent of plaintiff, they abandoned said operation; that defendant Glens Falls Indemnity Company were, at all times, promptly notified by registered mail of the aforesaid acts and omissions of said Duque & Frazzini, and upon the suspension and abandonment of said operations by Duque & Frazzini, as aforesaid, plaintiff on June 11, 1945, notified said Glens Falls Indemnity Company by registered mail, that, as the surety of said Duque & Frazzini, it take such action as it may deem proper and that until it did so plaintiff, as Prime Contractor, upon demand of the War Department, would proceed with the work for the benefit of each of



said defendants and would comply with their reasonable instructions. Said defendant Glens Falls Indemnity Company, however, took no action whatever in the completion of the work, abandoned by said Duque & Frazzini as aforesaid, and plaintiff was compelled to complete the same; that said plaintiff did, at its own expense, furnish labor, material and equipment to complete, and did complete the work covered by its said subcontract with Duque & Frazzini hereto attached and marked Exhibit "A". That in completion thereof after its abandonment as aforesaid, and in payment [10] of labor and material and rental of equipment and miscellaneous bills necessarily incident thereto, plaintiff necessarily expended the respective amounts and furnished labor, material, machinery and equipment as follows:

(a) Labor \$20,452.70, Insurance \$2,593.86, (b) Repairs on Equipment, \$186.43 and \$3,969.97, respectively, (c) Parts for Equipments \$4,244.10, (d) Fuel, Grease and Oil for Equipment, \$1,371.50, (e) Rental on Equipment from plaintiff fully operated, \$18,485.17, (f) Rental of Equipment by Plaintiff not fully operated, \$2849.56, (g) Rental of Equipment by plaintiff on tonnage basis, \$6753.20, (h) Rental of Equipment from (1) P.D.O.C. fully operated, \$10,412.57, (a) P.D.O.C. not fully operated, \$108.50, (3) P.D.O.C. on tonnage basis, \$5349.73, (4) J. G. North & Sons, \$27,809.54, (5) Phoenix-Tempe Stone, \$6,102.05, (6) Bressi-Bevanda, \$1,152.61, (7) Martin Construction Company, \$270.00, (8) Axman-Miller, \$700.00, (i) Mis-

cellaneous labor, \$4,803.15, (j) Freight on equipment, \$663.39. That the above items total \$118,278.03.

### XVIII.

That during the period from the abandonment of said work by said Duque & Frazzini on or about June 8, 1945, as aforesaid, until the completion thereof by plaintiff, as aforesaid, there was a gross earning based on said subcontract in the sum of \$76,230.73, consisting of the following items:

Item I, Gravel embankment, 7260 cubic yards at contract price of \$0.46 a cubic yard or \$3339.60; Item II, Gravel, Stab. Base, 4869 cubic yards at contract price of \$0.40 a cubic yard or \$1947.60; Item III, Gravel Base Course, 16357 cubic yards at contract price of \$0.46 a cubic yard or \$7524.22; Item IV, Concrete Aggregate, 46005 cubic yards at contract price of \$1.05 a cubic yard or \$48,305.25; Item V, Mineral aggregate, 20768 tons at \$0.65 a ton or \$13,499.20; Item VI, Rock base—A. C. [11] La Rue, 81 Cubic yards at \$0.46 a cubic yard or \$37.26; Item VII Gravel Base 8" C.M.P. 75 cubic yards at \$0.46 a cubic yard, or \$34.50; Item VIII, Sand, 2374 tons at \$0.65 a ton or \$1543.10. That the total of the above items is \$76,230.73; that there is a balance due plaintiff on account of the difference in the amount paid out or expended by plaintiff from the date of the abandonment of said subcontract by said Duque & Frazzini on or about June 8, 1945, to the completion of said work by plaintiff, as aforesaid, in the sum of \$118,278.03, and the

amount earned in the sum of \$76,230.73, or the sum of \$42,047.30.

### XIX.

That as shown by said statements herein alleged, after giving credit to said defendants for all amounts provided for under the terms of said subcontract hereto attached and marked Exhibit "A", in connection with the construction and completion of the work contracted to be done by said Duque & Frazzini, as aforesaid, there is now due, owing and unpaid from the defendants, and each of them, on account of the defendants' failure to fully perform the aforesaid subcontract work, the sum of \$78,-503.71.

### XX.

That plaintiff has done and fully performed each and every act on its part to be performed under the terms of the aforesaid subcontract, a copy of which is attached hereto as Exhibit "A", and under the terms of the aforesaid bond, a copy of which is attached hereto as Exhibit "B". That each and all of the amounts paid out by plaintiff as herein alleged and each and all of the charges therein made represent the fair and reasonable value of the labor, material, equipment and miscellaneous items furnished and provided by plaintiff, and each and all were necessary in order to perform and fulfill the terms and conditions of the aforesaid subcontract, a copy of which is attached hereto as [12] Exhibit "A".

## XXI.

That by reason of the failure of the defendants to carry out and faithfully perform said subcontract in accordance with the terms thereof, plaintiff has suffered a loss as herein set forth in the total sum of \$78,503.71.

That the defendants, and each of them, though requested to pay said amount, have failed and refused to do so. That there is now due, owing and unpaid from defendants, and each of them, to plaintiff the sum of \$78,503.71, together with interest thereon at 7% per annum from the date of the respective payments and charges.

Wherefore, plaintiff prays that it have and receive judgment against said defendants, and each of them, in the sum of \$78,503.71, together with interest at seven per cent per annum upon each of the amounts so advanced and expended by plaintiff from the date of said respective advancements until paid. Plaintiff further prays the Court for its costs and for such other and further relief as to the court may seem meet and proper.

/s/ STEPHEN MONTELEONE,  
Attorney for Plaintiff. [13]

State of California,  
County of Los Angeles—ss.

N. L. Basich, being by me first duly sworn, deposes and says: that he is the President of Plaintiff corporation in the above entitled action; that he

has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ N. L. BASICH.

Subscribed and sworn to before me this 26th day of December, 1945.

/s/ DOROTHY P. SOETH,

Notary Public in and for said County of Los Angeles, State of California.

My commission expires February 19, 1946. [14]

## EXHIBIT A

### Subcontract Agreement

This Agreement, made this 7th day of February, 1945, by and between Basich Brothers Construction Co., 600 S. Fremont Ave., Alhambra, California, party of the first part, hereinafter called the Contractor, and Duque & Frazzini, P.O. Box 75, Tonopah, Nevada, party of the second part, hereinafter called the Subcontractor, witnesseth: That

Whereas, the Contractor has heretofore entered into a Contract, hereinafter referred to as the original contract, dated January 25, 1945, with War Department, U. S. Engineer Office, 751 S. Figueroa St., Los Angeles, California, hereinafter called the Principal, for the Construction of Taxiways, warm-up and parking aprons, Job No. Davis-Monthan

ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.-1302, which contract includes the following described work to be done under this agreement:

Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18"-12"-18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2.

Now, Therefore, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, the Contractor and the Subcontractor do hereby mutually agree as follows:

#### Article I. Performance of Work.

The Subcontractor shall furnish all materials, supplies and equipment, except as otherwise herein provided, and perform all labor required for the completion of the said work in accordance with all provisions of the original contract and of the specifications and plans referred to therein, all of which are hereby made a part of this agreement, and under the direction and to the satisfaction of the Principal's engineer or other authorized representative in charge of said work.

Article II. Commencement and Completion  
of Work.

The work shall be commenced not later than February 19, 1945, and shall be completed on or before June 3, 1945.

Article III. Changes in the Original Contract.

It is mutually agreed and understood that the Contractor is not an insurer or guarantor of the said work or of any part thereof, or of the performance by the Principal of the original contract as specified therein or otherwise, and that the Subcontractor shall be bound by any changes or alterations made by the Principal in the said original contract, specifications or plans, or in the amount of character of said work or any part thereof, to the same extent that the Contractor is bound thereby.

Article IV. Liability of Subcontractor.

The Subcontractor shall hold and save the Contractor harmless from any liability for damage to the said work, or for injury or damage to persons or property occurring on or in connection therewith.

Article V. Warning Signals, Barricades, Etc.

The Subcontractor shall provide, erect and maintain proper warning signals, signs, lights, barricades and fences on and along the line of said work, and shall take all other necessary precautions for the protection of the work and safety of the public.

Article VI. Compensation and Public Liability Insurance.

The Subcontractor, shall at his own expense, provide workman's compensation insurance in accordance with the requirements of the original contract and of all Federal, State and/or municipal laws, ordinances and regulations relating thereto; also, insurance against liability for injury to persons and/or property occurring on or in connection with the work; Provided, that if the Subcontractor fails to provide such insurance, the Contractor is authorized to provide the same and to deduct the amounts of the premiums payable therefor from any moneys at any time due the Subcontractor under this agreement.

Article VII. Patents.

The Subcontractor shall hold and save the Contractor harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, appliance or process furnished or used in or in connection with the performance of the said work.

Article VIII. Subletting and Assignment.

The work shall be performed by the Subcontractor with the assistance of workmen under his immediate superintendence, and shall not be sublet, assigned or other wise disposed of, either in whole or in part, except with the written consent of the Contractor.



## Article IX. Other Subcontractors.

The Subcontractor shall cooperate fully with other subcontractors employed on the work, and shall so plan and conduct his work as not to interfere with their operations or with those of the Contractor. The Contractor will not be responsible for any delays or interference resulting from the acts or operations of other subcontractors.

## Article X. Settlement of Controversies.

In the event any controversies should arise, the Contractor and the Subcontractor each will elect a representative, and the representative will in turn elect a third disinterested party to settle controversies. All decisions will be final.

## Article XI. Payment for Labor and Supplies.

The Subcontractor shall promptly make payment to all persons supplying him with labor, materials and supplies for the prosecution of the work or in connection therewith. Any such payments not made by the Subcontractor when due may be made by the Contractor and the amounts thereof deducted from any moneys at any time due the Subcontractor under this agreement.

## Article XII. Completion Work by Contractor.

If the Subcontractor shall fail to commence the work within the specified time, or to prosecute said work continuously with sufficient workmen and equipment to insure its completion the Contractor

within five (5) days will reserve the right to compel the Subcontractor to move in another plant. All cost in connection with moving in, moving out, erection, dismantling, operation, and any other cost in connection with operating and maintaining plant will be paid by the Subcontractor. In the event Basich Brothers Construction Co. plant is used, moving in and moving out expense will be paid by Basich [16] Brothers Construction Co.

#### Article XIII. Extension of Time.

No extension of the time herein specified for completion will be made in consideration of delays or suspensions of work due to the fault or negligence of the Subcontractor, and no extension will be granted that will render the Contractor liable for penalty or damages under the original contract.

#### Article XIV. Claims for Extra Work or Damages.

The Contractor will pay, for extra work performed and materials furnished by the Subcontractor under written authorization by the Principal's engineer, the actual cost thereof plus a percentage of said cost equal to one-half the percentage received by the Contractor, as and when he is paid therefor by the Principal.

#### Article XV. Basis and Scope of Payment.

Payment will be made to the Subcontractor for work actually performed and completed, as measured and certified to by the Principal's engineer, at the unit prices hereinafter specified, which prices shall be accepted by the Subcontractor as full com-

ensation for furnishing all material and for doing all work contemplated and embraced in this agreement; also all loss and damage arising out of the nature of the work aforesaid, and for all risks of every description connected with the said work; also for all expense incurred by the Subcontractor by or in consequence of the suspension or discontinuance of the work.

#### Article XVI. Partial Payment.

Partial payments for work performed under this agreement will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile. In the event the Subcontractor is indebted to the Contractor for cash advances, supplies, materials, equipment, rental, labor, insurance on labor, or other proper charges against the work, the amount of such indebtedness may be deducted from any payment or payments made under this provision.

#### Article XVII. Final Payment.

Upon the completion of the Subcontractors contract, the Contractor will pay the remaining amount due him under this agreement within 30 days. All prior partial payments shall be subject to correction in the final payment; Provided, that if, on completion of the said work by the Subcontractor and prior to the completion of the original contract as a whole, the Subcontractor shall demand and receive full payment for his work according to the computations of the Principal's engineer, any

changes thereafter made in said computations shall not inure in whole or in part to the benefit or loss of the Subcontractor. Final payment as herein provided shall release the Contractor from any further obligation whatsoever in respect to this agreement.

Article XVIII. Failure to Enforce Provisions  
Not a Waiver.

The failure of the Contractor to enforce at any time any of the provisions of this contract or to require at any time performance by the Subcontractor or any of the provisions hereof, shall in no way be construed to be a waiver, nor in any way to affect the validity of this agreement or any part thereof or the right of the Contractor to thereafter enforce each and every such provision.

Article XIX. Penalties.

It is understood that any fines, penalties, levies, assessments or charges for liquidated damages of any nature made by the Principal upon the Contractor for work done under this agreement will be charged to the Subcontractor. [17]

Article XX. Delays.

The Subcontractor shall have no claim for damages due to delays in delivery of material or failure of the Principal to provide Right of Way, plans, stakes, or delay from any cause whatsoever.

Article XXI. Special Provisions.

1. All materials to be taken from Mr. and Mrs. Collbs property.

2. Basich Brothers Construction Co. to pay for all royalties for materials. In the event Mr. and Mrs. Collbs material pit is exhausted, Basich Brothers Construction Co. will pay royalties for other material in the immediate vicinity.

3. Duque & Frazzini to submit weekly pay-rolls by Monday night of each week for the previous week which closes on Saturday at midnight to Basich Brothers Construction Co. Basich Brothers Construction Co. to pay labor, compensation, insurance, public liability, property damage, Arizona employment insurance, Federal Old Age, Excise Tax on Employers and any other insurance on labor and charge same to Duque & Frazzini, which amounts are to be deducted from amount earned.

4. Duque & Frazzini to pay Arizona Tax Commission for privilege of doing business in Arizona.

5. Duque & Frazzini to erect two plants, each to produce 800 c.y. of suitable material to be used in connection with the contract.

6. Duque & Frazzini to stockpile rock and sand for concrete pavement nearest to second party's plant. Same thing applies to rock and sand for asphalt concrete pavement.

7. Rock furnished for Items 21 and 22 shall be 3" (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3" maximum rock.

8. Permission is hereby granted to Duque & Frazzini to subcontract a portion of their contract to Vegas Rock & Sand Co., Las Vegas, Nevada.

Article XXI. (a) Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

If this Subcontract is in excess of one hundred thousand dollars, (\$100,000.00), the Subcontractor agrees to renegotiate his contract prices pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528.

(a) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the contractor under this contract can be determined with reasonable certainty, the Secretary of War and the contractor, upon the written demand of the Secretary of War, will negotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall be retained by

the Government or repaid to the Government by the Contractor, as directed by the Secretary of War.

(c) Each fixed-price or lump sum subcontract in an amount in excess of \$100,000 entered into by the contractor hereunder shall include the following provisions: [18]

(1) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the Subcontractor under this contract can be determined with reasonable certainty, the Secretary of War and the Subcontractor, upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(2) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Secretary of War,

(A) Be deducted by the Contractor from payments to the Subcontractor under this contract; or

(B) Be paid by the Subcontractor directly to the Government; or

(C) Be repaid by the Subcontractor to the Contractor.

(3) The Subcontractor agrees that the Contractor shall not be liable to the Subcontractor for or on account of any amount repaid to the Contractor or

paid to the Government by the Subcontractor or deducted by the Contractor from payments under this contract, pursuant to directions from the Secretary of War in accordance with the provisions of this Article. Under its contract with the Government, the Contractor is obligated to pay or credit to the Government all amounts repaid by or withheld from the Subcontractor hereunder.

(4) The term "Secretary of War" as used herein includes his duly authorized representatives.

(d) If any renegotiation between the Secretary of War and any Subcontractor pursuant to the provisions required by paragraph (c) hereof results in a reduction of the contract price of the subcontract, the Government shall retain from payments to the Contractor under this contract, or the Contractor shall repay to the Government, as the Secretary of War may direct, the amount of such reduction, less any amounts paid thereon by the Subcontractor directly to the Government.

(e) The term "Secretary of War" as used herein includes his duly authorized representatives.

#### Article XXII. Bond Provision.

Duque & Frazzini to furnish 100% Combination Bond (labor, material, and performance). Basich Brothers Construction Co. will pay for said bond.



Article XXIII. Schedule of Subcontract Unit Prices with Approximate Quantities and Amounts

Item	Approximate		Description	Approximate	
	Quantity	Unit		Price	Amount
9	15,300	c.y.	Gravel embankment, Gravel embankment shall be put in bin by second party and hauled away by first party. Any over - production that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	7,038.00
11	9,000	c.y.	Gravel for stabilized sub-grade under gravel base course. Gravel shall be put in by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Measurement to be computed on truck water level.	.40	3,600.00
15	42,530	c.y.	Gravel for base course. Gravel shall be put in bin by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	

Item	Approximate		Description	Approximate	
	Quantity	Unit		Price	Amount
21	49,600	c.y.	Rock and sand for 18"—12" 18" Portland cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehand- led by first party. Engineers measurement for concrete will be used to govern quan- tities.	1.05	
22	6,320	c.y.	Rock and sand for 10" Port- land cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehandled by first party. Engineers measurement for concrete will be used to govern quan- tities.	1.05	
26A	8,535	tons	Rock and sand for binder course asphaltic concrete, Class 1.	.65	
26B	11,200	tons	Rock and sand for wear- ing course asphaltic con- crete, Class 2. Rock and sand for Items 26A, and 26B, shall be put in stockpile by second party and rehandled by first party. Engineers weights for vari- ous classes of asphalt concrete will be used to govern quan- tities; however, oil used is to be removed first before ton- nage computed.	.65	

Article XXIV. Damages for Delay in Completion.

If the Subcontractor shall fail to complete the said work within the time and in the manner specified, or within the time of such extensions as may be granted, he shall forfeit and pay to the Contractor the sum of the amount assessed by U. S. Engineer Office, per day for each calendar day that he is in default according to the terms hereof, which sum the Contractor shall retain as liquidated damages.

Article XXV.

It is mutually agreed that time is of the essence of this [20] agreement, and that it contains the whole and entire understanding of the parties hereto, and that it shall bind their heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said parties have hereunto set their hands the day and year above written.

BASICH BROTHERS  
CONSTRUCTION CO.,

By /s/ N. L. BASICH

Party of the First Part

DUQUE & FRAZZINI

By /s/ CARSON FRAZZINI

Party of the Second Part

## EXHIBIT B

Glens Falls Indemnity Company  
Of Glens Falls, New York

## Sub-Contract Bond

Know All Men By These Presents, That we, Duque & Frazzini of Tonopah, Nevada, (hereinafter called the Principal) as Principal and Glens Falls Indemnity Company, of Glens Falls, New York (hereinafter called the Surety) as Surety, are held and firmly bound unto Basich Brothers Construction Co., 600 S. Fremont Ave., Alhambra, California, (hereinafter called the Obligee) in the sum of One Hundred One Thousand Seven Hundred Forty-five and 55/100 (\$101,745.55) Dollars, for the payment whereof said Principal and Surety bind themselves firmly by these presents.

Whereas, the Principal has entered into a written contract dated February 7th, 1945, with the Obligee for—

The construction of taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.-1302.

a copy of which is or may be hereto annexed.

Now, Therefore, The Condition Of This Obligation Is Such, that if the Principal shall faithfully perform the work contracted to be performed under said contract, and shall pay, or cause to be paid in full, the claims of all persons performing labor upon

or furnishing materials to be used in, or furnishing appliances, teams or power contributing to such work, then this obligation shall be void; otherwise to remain in full force and effect.

This bond is executed for the purpose of complying with the laws of the State of Arizona, and shall inure to the benefit of any and all persons who perform labor or furnish materials to be used in, or furnish appliances, teams or power contributing to the work described in said contract, so as to give such persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for by the laws of the State of Arizona, or in a separate suit brought on this bond. No right of action shall accrue hereunder to or for the use of any person other than the Obligee except as such right of action may be given by the Mechanics' Lien Laws of the State of Arizona to persons performing labor or furnishing materials, appliances, teams or power as aforesaid. The total amount of the surety's liability under this bond, both to the Obligee and to persons furnishing labor or material, appliances, teams or power, shall in no event exceed the penalty hereof.

The Principal and Surety further agree to pay all just labor claims arising under said contract, within two (2) weeks after demand, and to waive the filing of lien claims or giving written notice required by Statute as a condition to bringing suit to enforce the same.

Provided, however, as to said Obligee, and upon the Express Conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon by said Obligee:

First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; [22] shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the Principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

Second: That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice

of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.

Third: That the Surety shall not be liable for any damages resulting from strikes, or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes, nor for damages from injury to, or the death of, any persons, nor for the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished, or the maintenance thereof, or repairs thereto, nor for the furnishing of any bond or obligation other than this instrument.

Signed, sealed and dated this 20th day of February, 1945.

DUQUE & FRAZZINI,

By CARSON FRAZZINI,

[Corporate Seal]

GLENS FALLS INDEMNITY  
COMPANY,

By /s/ HARRY LEONARD,

Attorney.

State of California,  
County of Los Angeles—ss.

On this 20th day of February in the year One Thousand Nine Hundred and Forty-five, before me, Marwin F. Jonas, a Notary Public in and for said County of Los Angeles, residing therein, duly commissioned and sworn, personally appeared Harry Leonard, known to me to be the Attorney of the Glens Falls Indemnity Company, the Corporation that executed the said instrument on behalf of the Corporation therein named and acknowledge to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of Los Angeles the day and year in this certificate first above-written.

[Notarial Seal] MARWIN F. JONAS,  
Notary Public in and for the County of . . . . .,  
State of California.

My commission expires Nov. 2, 1947.

[Endorsed]: Filed Dec. 27, 1945. [23]



[Title of District Court and Cause.]

BILL OF PARTICULARS

State of California,  
County of Los Angeles—ss.

N. L. Basich, being first duly sworn, deposes and says: That he is the President of plaintiff corporation in the above-entitled action; that attached hereto, marked Schedules I to XXXXIV, inclusive, and made a part hereof, is an itemized statement set forth in particular constituting the items making the claim alleged in plaintiff's complaint on file herein; and that the same is true of his own knowledge. [24]

That said schedules are for the following items and amounts:

Schedule No.	Item	Amount	
		Charge	Credit
I	Payroll— Duque & Frazzini .....	\$ 38,979.65	
II	Payroll— Pioneer Crusher .....	8,240.54	
III	Payroll— Pioneer Crusher .....	12,172.04	
IV	Payroll— P. D. O. C. Crusher.....	3,250.01	
V	Payroll— Hot Plant—Sand .....	2,888.92	
VI	Insurance .....	38,979.65	
VII	Equipment Rental—Fully Operated—Basich Brothers Construction Co. ....	3,989.41	

*Glens Falls Indemnity Co. vs.*

Schedule No.	Item	Amount	
		Charge	Credit
VIII	Equipment Rental — Not Fully Operated — Basich Brothers Construction Co.	\$2,773.86	
IX	Equipment Rental—Royalty Basis — Basich Brothers Construction Co.	4,191.60	
X	Equipment Rental—Fully Operated—P. D. O. C.....	6,902.37	
	Not Fully Operated.....	261.34	
XI	Equipment Rental—Fully Operated by Basich Brothers—J. J. North & Sons....	4,956.06	
XII	Equipment Rental—Fully Operated—B. B. Bonner....	625.74	
XIII	Equipment Rental — Not Fully Operated—Bressi & Bevanda .....	582.72	
XIV	Equipment Rental — Not Fully Operated—Industrial Equipment Co. ....	176.00	
XV	Equipment Rental—Fully Operated — Basich Brothers Construction Co.....	18,485.17	
XVI	Equipment Rental — Not Fully Operated — Basich Brothers Construction Co.	2,849.56	
XVII	Equipment Rental—Royalty Basis — Basich Brothers Construction Co.	6,753.20	
XVIII	Equipment Rental — Not Fully Operated — P. D. O. C. ....	108.50	
XIX	Equipment Rental—Fully Operated—P. D. O. C.....	10,412.57	

Schedule No.	Item	Amount	
		Charge	Credit
XX	Equipment Rental— Royalty Basis—P. D. O. C.	\$5,349.73	
XXI	Equipment Rental—Fully Operated—J. G. North & Sons .....	27,809.54	
XXII	Equipment Rental—Fully Operated—Phoenix Tempe Stone Co. ....	6,102.05	
XXIII	Equipment Rental — Not Fully Operated—Bressi & Bevanda .....	1,152.61	
XXIV	Equipment Rental — Not Fully Operated — Martin Construction Co. ....	270.00	
XXV	Equipment Rental — Not Fully Operated — Axman- Miller Construction Co.....	700.00	
XXVI	Repairs made by others on Basich Brothers Construc- tion Co. Equipment—Not Fully Operated .....	275.51	
XXVII	Parts purchased for Basich Brothers Construction Co. Equipment Not Fully Operated .....	2,257.88	
XXVIII	Parts Taken from Basich Brothers Construction Co. Stock .....	1,723.75	
XXIX	Fuel, Grease and Oil on Equipment Not Fully Operated .....	732.47	
XXX	Miscellaneous Labor, In- voices, Etc. ....	2,814.24	
XXXI	Freight on Rented Equip- ment .....	326.89	

Schedule No.	Item	Charge	Amount Credit
XXXII	Repairs Made by Others on Basich Brothers Con- struction Co. Equipment Not Fully Operated.....	\$3,969.97	
XXXIII	Parts Purchased for Basich Brothers Construction Co. Equipment Not Fully Operated .....	3,215.19	
XXXIV	Parts Taken from Basich Brothers Construction Co. Stock .....	1,028.91	
XXXV	Fuel, Grease and Oil on Equipment Not Fully Operated .....	1,371.50	
XXXVI	Miscellaneous Labor, In- voices, Etc. ....	4,803.15	
XXXVII	Freight on Rented Equip- ment .....	663.39	
XXXVIII	Production—Gravel Base..		\$ 25,191.44
XXXIX	Production — Gravel Sta- bilized Base .....		4,109.20
XXXX	Production — Gravel Em- bankment .....		4,719.60
XXXXI	Production—Concrete Ag- gregate .....		70,710.52
XXXXII	Production — Mineral Ag- gregate .....		15,377.93
XXXXIII	Production—Concrete Ag- gregate for Structures.....		405.30
XXXXIV	Miscellaneous Credits .....		1,319.96
		<hr/>	
		\$201,124.04	\$121,833.95
	Total Charges .....	\$201,124.04	
	Total Credits .....	121,833.95	
		<hr/>	
	Balance Due .....	\$ 79,290.09	

/s/N. L. BASICH

Subscribed and sworn to before me this 1st day of July, 1946.

[Seal] /s/ KAY TWOMBLEY

Notary Public in and for said County and State.

My Commission expires: Feb. 13, 1950. [29]

SCHEDULE I

Payroll. Duque & Frazzini. 2/11/45 to 6/9/45.  
\$38,979.65.

Employee: Brown, Jack. Occupation: Tractor Driver  
Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	14	20.5	\$ 67.13
2/18-2/24/45	32	28	111.00
2/25-3/ 3/45		14	31.50
3/ 4-3/10/45	32	19	90.75
3/11-3/17/45	35	26	111.00
3/18-3/24/45	32	51	162.75
3/25-3/31/45	40	51	174.75
4/ 1-4/ 7/45	16	15	57.75
4/ 8-4/14/45	40	42	154.50
4/15-4/21/45	32	55	171.75
4/22-4/28/45	12	18.5	59.63
4/29-5/ 5/45	40	23	111.75
5/ 6-5/12/45	40	46.5	164.63
Total .....			<hr/> \$1,468.89

*Glens Falls Indemnity Co. vs.*

Employee: Cohen, Sidney. Occupation: Truck Driver  
 Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	16	12	\$ 34.00
2/18-2/24/45	16	8	28.00
3/18-3/24/45	16	5.5	24.25
Total .....			\$ 86.25

Employee: Greer, Clyde. Occupation: Laborer  
 Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	32	12.5	\$ 41.87
2/18-2/24/45	34	31	70.44
2/25-3/ 3/45	8	1	8.31
Total .....			\$ 120.62

Employee: Hurler, Ray. Occupation, Tractor Operator  
 Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	30.5	14	\$ 77.25
2/18-2/24/45	36	31	123.75
2/25-3/ 3/45	40	36	141.00
3/ 4-3/10/45	32	17.5	87.38
3/11-3/17/45	40	37	143.25
3/18-3/24/45	37.5	29	121.50
3/25-3/31/45	40	34	136.50
4/ 1-4/ 7/45	40	33	134.25
4/ 8-4/14/45		12	27.00
4/15-4/21/45	8	2.5	17.63
4/29-5/ 5/45	40	30	127.50
5/ 6-5/12/45	50	40	150.00
5/13-5/19/45	40	30	127.50
5/20-5/26/45	40	32.5	133.13
5/27-6/ 2/45	16	39.5	112.88
6/ 3-6/ 9/45	40	21	107.25
Total .....			\$1,767.77

Employee: Humez, Alex. Occupation: Laborer  
 Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	32	13.5	\$ 43.11

Rate of Pay Changed to: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	34	31	\$ 70.44
Total .....			\$ 113.55

Employee: McDaniel, Joe. Occupation: Laborer  
 Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	16	11	\$ 26.81

Rate of Pay Changed to: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	34	31	\$ 70.44
2/25-3/ 3/45	8	1	8.31
Total .....			\$ 105.56

Employee: Ryan, Earl. Occupation: Crusher Supt.  
 Rate of Pay: Regular Time, \$600.00 per mo.

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	56		\$ 138.46
2/18-2/24/45	56		138.46
2/25-3/ 3/45	56		138.46
3/ 4-3/10/45	56		138.46
3/11-3/17/45	56		138.46
3/18-3/24/45	56		138.46
Total .....			\$ 830.76

*Glens Falls Indemnity Co. vs.*

Employee: Scott, Earl. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	40	18	\$ 67.00
2/18-2/24/45	40	27.5	81.25
2/25-3/ 3/45	24	8	36.00
3/ 4-3/10/45	34	11.5	51.25
3/11-3/17/45	8	2	11.00
3/18-3/24/45	25	24.5	61.75
3/25-3/31/45	32	31.5	79.25
4/ 1-4/ 7/45	40	29	83.50
4/ 8-4/14/45	24	17	49.50
6/ 3-6/ 9/45	40	16	64.00
Total .....			\$ 584.50

Employee: Stillwell, Hailey. Occupation: Laborer

Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	29.5	11.5	\$ 38.57

Rate of Pay Changed to: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	34	31	\$ 70.44
Total .....			\$ 109.01

Employee: Taylor, Paul. Occupation: Foreman

Rate of Pay: Regular Time, \$1.75; Overtime, \$2.625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45		9.5	\$ 24.94
2/18-2/24/45	40	34	159.25
2/25-3/ 3/45	40	34.5	160.56
3/ 4-3/10/45	32	28	129.50
3/11-3/17/45	40	31.5	152.69
3/18-3/24/45	36	24	126.00
3/25-3/31/45	8	2	19.25
Total .....			\$ 772.19



Employee: Allred, Vaughn P. Occupation: Truck Driver  
 Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-3/24/45	37	48	\$ 109.00
2/25-3/ 3/45	32	21	63.50
3/ 4-3/10/45	21	9	34.50
3/11-3/17/45	8	2	11.00
3/18-3/24/45	29	23	63.50
3/25-3/31/45	36	27	76.50
4/ 1-4/ 7/45	40	23	74.50
4/ 8-4/14/45	40	24	76.00
4/15-4/21/45	40	25.5	78.25
4/22-4/28/45	40	27	80.50
4/29-5/ 5/45	16	15	38.50
5/ 6-5/12/45	40	28.5	82.75
5/13-5/19/45	40	20.5	70.75
5/20-5/26/45	40	34.5	91.75
5/27-6/ 2/45	32	35.5	85.25
6/ 3-6/ 9/45	40	23	74.50
Total .....			\$1,110.75

Employee: Bogle, Farrow. Occupation: Carpenter  
 Rate of Pay: Regular Time, \$1.35; Overtime, \$2.025

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	40	33.5	\$ 121.84
2/25-3/ 3/45	34.5	25	97.21
3/ 4-3/10/45	32	21	85.73
3/11-3/17/45	32	17.5	78.64
Total .....			\$ 383.42

Employee: Hampton, Clarence. Occupation: Plant Foreman  
 Rate of Pay: Regular Time, \$1.75; Overtime, \$2.625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	38	21.5	\$ 122.94
2/25-3/ 3/45	36	30.5	143.06
3/ 4-3/10/45	32	30.5	136.06
3/11-3/17/45	32	17	100.63
3/18-3/24/45	37.5	33	152.26
3/25-3/31/45	40	54.5	213.06
4/ 1-4/ 7/45	40	44	185.50
4/ 8-4/14/45	40	45.5	189.44
4/15-4/21/45	40	45	188.13
4/22-4/28/45	40	46	190.75
4/29-5/ 5/45	40	53	209.13
5/ 6-5/12/45	40	50.5	202.56
5/13-5/19/45	40	41	177.63
5/20-5/26/45	40	51	203.88
5/27-6/ 2/45	32	55.5	201.69
6/ 3-6/ 9/45	40	31.5	152.69
Total .....			\$2,769.41

Employee: Hampton, Ernest. Occupation: Laborer  
 Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	33	13	45.94
3/ 4-3/10/45	32		28.00
3/11-3/17/45	16	14	32.38
3/18-3/24/45	36	27	66.94
3/25-3/31/45	40	28.5	72.41
4/ 1-4/ 7/45	40	28.5	72.41
4/ 8-4/14/45	40	28.5	72.41

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/15-4/21/45	10	10	22.50
Total .....			\$ 424.15

Employee: Hansen, Carl. Occupation: Oiler  
 Rate of Pay: Regular Time, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	8	13	\$ 26.81
2/25-3/ 3/45	34	46.5	101.16
3/ 4-3/10/45	32	11.5	48.02
3/11-3/17/45	40	38	94.58
3/18-3/24/45	36	35.5	87.02
3/25-3/31/45	32	35.5	83.12
4/ 1-4/ 7/45	40	42.5	101.16
4/ 8-4/14/45	40	52	115.05
4/15-4/21/45	29	17	53.14
Total .....			\$ 710.06

Employee: Harvey, John. Occupation: Truck Driver  
 Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	17	8.5	\$ 29.75
2/25-3/ 3/45	34	12	52.00
3/ 4-3/10/45	34	.5	34.75
3/11-3/17/45	8	2	11.00
Total .....			\$ 127.50

Employee: Johnson, Joseph. Occupation: Timekeeper  
 Rate of Pay: Regular Time, \$300.00 per mo.

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	48.5		\$ 49.45
2/25-3/ 3/45	56		69.23
3/ 4-3/10/45	56		69.23
Total .....			\$ 187.91

*Glens Falls Indemnity Co. vs.*

Employee: Mariscal, Frank. Occupation: Laborer  
 Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	25	13	38.94
3/ 4-3/10/45	32	15	47.69
3/11-3/17/45	40	29	73.06
3/18-3/24/45	36	27	66.94
3/25-3/31/45	40	29	73.06

Occupation Change: Oiler

Rate of Pay Changed to: Regular Time, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 1-4/ 7/45	40	33	\$ 87.26
4/ 8-4/14/45	40	34.5	89.46
4/15-4/21/45	34	22.5	66.06
4/22-4/28/45	32	24.5	67.03
4/29-5/ 5/45	40	40	97.50
5/ 6-5/12/45	40	29.5	115.84
5/13-5/19/45	40	46	149.88
5/20-5/26/45	40	26	108.63
5/27-6/ 2/45	24	40.5	116.53
6/ 3-6/ 9/45	40	27.5	111.72
Total .....			\$1,320.76

Employee: Sanders, Barney. Occupation: Truck Driver  
 Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	24	11	\$ 40.50
2/25-3/ 3/45	34	12.5	52.75
Total .....			\$ 93.25

Employee: Talavera, Peliciano. Occupation: Laborer  
 Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	33	13	45.94
3/ 4-3/10/45	32	10.5	41.78
3/11-3/17/45	16	9.5	26.47
3/18-3/24/45	28	14.5	43.53
3/25-3/31/45	36	28.5	68.91
4/ 1-4/ 7/45	40	30	74.38

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 8-4/14/45	40	33	\$ 80.55
4/15-4/21/45	34	21.5	59.63
4/22-4/28/45	32	21	57.15
4/29-5/ 5/45	16	18	38.70
5/ 6-5/12/45	40	29	75.15
5/13-5/19/45	32	29	67.95
5/20-5/26/45	40	31.5	78.53
5/27-6/ 2/45	32	39.5	82.13
6/ 3-6/ 9/45	40	17.5	59.63
Total .....			\$ 911.59

Employee: Van Valkenburg, Edward. Occupation, Laborer  
 Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	33	13	45.94
3/ 4-3/10/45	32		28.00
3/11-3/17/45	16	14	32.38
3/18-3/24/45	36	27	66.94
3/25-3/31/45	40	29	73.06
4/ 1-4/ 7/45	40	28.5	72.41

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 8-4/14/45	40	28.5	74.48
4/15-4/21/45	24	12.5	38.48
4/22-4/28/45	40	30.5	77.18
4/29-5/ 5/45	40	30.5	77.18
5/ 6-5/12/45	40	27	72.45
5/13-5/19/45	24	16.5	43.88
Total .....			\$ 713.54

Employee: Tomany, Don. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	40	98	\$ 187.00
2/25-3/ 3/45	40	29	83.50
3/ 4-3/10/45	24	17	49.50
5/11-5/17/45	28	11	44.50
3/18-3/24/45	40	35.5	93.25
3/25-3/31/45	40	38	97.00
4/ 8-4/14/45	40	65	137.50
4/15-4/21/45	24	40.5	84.75
4/22-4/28/45	40	39.5	99.25
4/29-5/ 5/45	40	35	92.50
5/ 6-5/12/45	24	11	40.50
Total .....			\$1,009.25

Employee: Smith, Jim. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	8	16	\$ 32.00
Total .....			\$ 32.00

Employee: Burehfield, Clyde. Occupation: Crusher Operator  
 Rate of Pay: Regular Time, \$1.375; Overtime, \$2.0625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	10	13	\$ 40.56
3/ 4-3/10/45	32	12	68.75
3/11-3/17/45	24	31.5	97.97
3/18-3/24/45	34	35	118.94
3/25-3/31/45	40	55	168.44

Occupation Changed to: Crusher Foreman

Rate of Pay Changed to: Regular Time, \$1.75; Overtime, \$2.625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 1-4/ 7/45	40	42.5	\$ 181.56
4/ 8-4/14/45	40	52.5	207.81
4/15-4/21/45	32	38.5	157.06
4/22-4/28/45	40	30.5	150.06
4/29-5/ 5/45	40	51	203.88
5/ 6-5/12/45	16	13	62.13

Occupation Changed Back to: Crusher Operator

Rate of Pay Changed Back to: Regular Time, \$1.375;  
 Overtime, \$2.0625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
5/20-5/26/45	16	5	\$ 32.31
<b>Total</b> .....			<b>\$1,489.47</b>

Employee: Gorby, Clifford. Occupation: Oiler  
 Rate of Pay: Regular Time, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	34.5	17	\$ 58.50
3/ 4-3/10/45	10		9.75
3/18-3/24/45	31	18.5	57.29
3/25-3/31/45	8	5	15.11
<b>Total</b> .....			<b>\$ 140.65</b>

*Glens Falls Indemnity Co. vs.*

Employee: Scott, Dallas. Occupation: Tractor Operator

Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	32	19	\$ 90.75
3/ 4-3/10/45	40	33.5	135.38
3/11-3/17/45	30.5	24.5	100.88
3/18-3/24/45	29.5	37	127.50
3/25-3/31/45	31	41	138.75
4/ 1-4/ 7/45	32	41	140.25
4/ 8-4/14/45	40	26	118.50
4/15-4/21/45	40	29	125.25
Total .....			\$ 977.26

Employee: Shrader, Jim. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	40	76	\$ 154.00
Total .....			\$ 154.00

Employee: Rutherford, Arthur. Occupation: Tractor Operator

Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	20	13	\$ 59.25
Total .....			\$ 59.25

Employee: Schellhase, Frank. Occupation: Truck Driver

Rate of Pay: Regular, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	4.5		\$ 4.50
Total .....			\$ 4.50



Employee: Serventi, Lucien A., Jr. Occupation: Truck Driver  
 Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/ 4-3/10/45	24	.5	\$ 24.75
Total .....			\$ 24.75

Employee: Mosley, Thamor O. Occupation: Shovel Operator  
 Rate of Pay: Regular Time, \$1,625; Overtime, \$2.4375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/11-3/17/45	40		\$ 65.00
3/18-3/24/45	36.5	22.5	113.93
3/25-3/31/45	40	22.5	119.84
4/ 1-4/ 7/45	36	33	138.94
4/ 8-4/14/45	40	34.5	149.09
4/15-4/21/45	34	22.5	110.09
4/22-4/28/45	40	35.5	151.53
4/29-5/ 5/45	40	38.5	158.84
5/ 6-5/12/45	32	31.5	128.78
5/13-5/19/45	40	34	147.88
5/20-5/26/45	40	22.5	119.84
5/27-6/ 2/45	32	41	153.16
6/ 3-6/ 9/45	40	21	116.19
Total .....			\$1,673.11

*Glens Falls Indemnity Co. vs.*

Employee: Wailes, Stacey. Occupation: Oiler  
 Rate of Pay: Regular, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/11-3/17/45	32		\$ 31.20
3/18-3/24/45	36.5	26	73.62
3/28-3/31/45	40	22.5	71.91
4/ 1-4/ 7/45	40	33	87.26
4/ 8-4/14/45	32	34	80.93
4/15-4/21/45	40	24	74.10
4/22-4/28/45	32	29.5	74.34
4/29-5/ 5/45	40	38	94.58
5/ 6-5/12/45	32	31.5	77.27
5/13-5/19/45	40	34	88.73
5/20-5/26/45	32	20.5	61.18
5/27-6/ 2/45	32	39.5	88.97
6/ 3-6/ 9/45	40	21	69.71
Total .....			\$ 973.80

Employee: Paco, Raymond. Occupation: Laborer  
 Rate of Pay: Regular, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/11-3/17/45	32	15	\$ 47.69
3/18-3/24/45	24	25	53.81
3/25-3/31/45	28	23	54.69
Total .....			\$ 156.19

Employee Acosta, Antonia A. Occupation: Laborer  
 Rate of Pay: Regular, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	20	3	\$ 21.44
Total .....			\$ 21.44

Employee: Collins, Charles. Occupation, Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	17.5	9	\$ 31.00
3/25-3/31/45	28	18.5	55.75
4/ 1-4/ 7/45	36	14.5	57.75
4/ 8-4/14/45	16	17	41.50
4/15-4/21/45	34	21	65.50
4/22-4/28/45	16	13.5	36.25
4/29-5/ 5/45	36	35.5	89.25
5/ 6-5/12/45	36	24	72.00
5/13-5/19/45	36	12	54.00
5/20-5/26/45	40	18	67.00
5/27-6/ 2/45	24	34	75.00
6/ 3-6/ 9/45	40	12	58.00
<b>Total</b> .....			<b>\$ 703.00</b>

Employee: Cosillo, Jose A. Occupation: Laborer

Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	11.5		\$ 10.06
3/25-3/31/45	36	26.5	66.28
4/ 1-4/ 7/45	40	29	73.06
4/ 8-4/14/45	40	28.5	72.41

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/15-4/21/45	30	13	\$ 44.55
4/22-4/28/45	40	31	77.85
4/29-5/ 5/45	40	33.5	81.23
5/ 6-5/12/45	24	16	43.20
<b>Total</b> .....			<b>\$ 468.64</b>

*Glens Falls Indemnity Co. vs.*

Employee: Collins, Earl. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	22	10	\$ 37.00
3/25-3/31/45	28	18.5	55.75
4/ 1-4/ 7/45	36	26.5	75.75
4/ 8-4/14/45	24	17.5	50.25
4/15-4/21/45	34	21.5	66.25
4/22-4/28/45	24	23.5	59.25
4/29-5/ 5/45	40	34.5	91.75
5/ 6-5/12/45	36	24	72.00
5/13-5/19/45	28	20	58.00
5/20-5/26/45	40	18	67.00
5/27-6/ 2/45	32	30	77.00
6/ 3-6/ 9/45	40	18	67.00
Total .....			\$ 777.00

Employee: Gatlin, Cecil L. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	22	10	\$ 37.00
3/25-3/31/45	28	18.5	55.75
4/ 1-4/ 7/45	36	26.5	75.75
4/ 8-4/14/45	24	17.5	50.25
4/15-4/21/45	18		18.00
4/29-5/ 5/45	16	12.5	34.75
5/ 6-5/12/45	24	14	45.00
5/13-5/19/45	40	16.5	64.75
5/20-5/26/45	40	18	67.00
5/27-6/ 2/45	32	14	53.00
6/ 3-6/ 9/45	40	18	67.00
Total .....			\$ 568.25

Employee: McDaniel, Leslie. Occupation, Tractor Operator  
 Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	4		\$ 6.00
2/18-2/24/45	4		6.00
<b>Total</b> .....			<b>\$ 12.00</b>

\*[Written Notation]: Eliminate.  
 Labor Borrowed from Basich Brothers

Employee: McCoy, Rex. Occupation: Maintainer Operator  
 Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Wages Gross
	Regular	Overtime	
2/18-2/24/45	22.5		\$ 33.75
<b>Total</b> .....			<b>\$ 33.75</b>

\*[Written Notation]: Eliminate.  
 Labor Borrowed from Basich Brothers

**SCHEDULE II**

Payroll. Pioneer Crusher. 3/25/45 to 6/9/45.  
 \$8,240.54.

**SCHEDULE III**

Payroll. Pioneer Crusher. 6/9/45 to 9/22/45.  
 \$12,172.04.

**SCHEDULE IV**

Payroll. P. D. O. C. Crusher. 6/3/45 to 7/7/45.  
 \$3,250.01.

**SCHEDULE V**

Payroll. Hot Plant—Sand. 6/9/45 to 9/22/45.  
 \$2,888.92.

## SCHEDULE VI

Insurance 2/17/45 to 9/22/45, \$7,958.00

## Labor and Insurance\*\*

Week Ending	Labor	Insurance
2/17/45	\$ 565.14*	\$ 59.29
2/24/45	1,727.15*	176.77
3/ 3/45	1,770.87*	183.14
3/10/45	1,339.23*	141.47
3/17/45	1,403.78*	151.10
3/24/45	1,956.68*	205.30
3/31/45	2,514.00*	270.95
4/ 7/45	3,132.91*	348.03
4/14/45	3,704.83*	413.71
4/21/45	3,130.53*	345.77
4/28/45	3,016.26*	332.35
5/ 5/45	4,522.19	545.44
5/12/45	4,563.10	549.55
5/19/45	3,603.47	438.89
5/26/45	3,523.02	415.55
6/ 2/45	3,564.49	421.78
6/ 9/45	3,517.01	421.04
6/16/45	2,648.23	334.05
6/23/45	2,732.51	341.64
6/30/45	2,473.40	319.11
7/ 7/45	2,027.95	279.65
7/14/45	1,420.86	182.41
7/21/45	1,447.18	184.63
7/28/45	1,358.39	172.00
8/ 4/45	1,431.46	175.58
8/11/45	958.00	124.59
8/18/45	102.54	11.16
8/25/45	1,000.64	135.72
9/ 1/45	885.39	112.36
9/ 8/45	667.09	83.49

Week Ending	Labor	Insurance
9/15/45	\$ 187.89	\$ 24.65
9/22/45	433.87	56.47
Totals .....	\$67,330.06	\$7,958.00
*Differential in 5506 and 1710 rate in Comp. Ins. ....		1,258.51
		<u>\$9,216.51</u>

\*\*Insurance includes Compensation, Public Liability, Property Damage, California Unemployment, Federal Old Age and Federal Excise.

SCHEDULE VII.

Equipment Rental. Fully Operated. Basich Brothers Construction Co., 2/12/45 to 5/19/45, \$3,989.41

Rental of Equipment by  
Basich Brothers Construction Company Fully Operated  
Owner of Equipment—Basich Brothers Construction Co.

Date	Description	Total Hours	Rate	Amount
2/12	D8 Dozer .....	4	9.375	\$37.50
2/19	Tractor W/PCU .....	4	8.45	33.80
2/20	Tractor W/PCU .....	6.5	8.45	54.93
2/21	Tractor W/PCU .....	8	8.45	67.60
2/22	D8 Tractor W/PCU....	8	8.45	67.60
2/26	Truck Semi No. 44.....	5	7.00	35.00
2/28	Welding Truck .....	8	6.85	54.80
	Welding Truck .....	.5	8.225	4.11
	D8 Dozer .....	6	8.45	50.70
	Semi-Truck No. 43.....	4	6.00	24.00
3/5	N.W. 80 Shovel.....	5	18.22	91.10
3/6	N.W. 80 Shovel.....	6	18.22	109.32
3/7	Welding Truck .....	8	6.85	54.80
	Welding Truck .....	2	8.225	16.45
3/8	N.W. 80 Shovel.....	8	18.22	145.76

Date	Description	Total Hours	Rate	Amount
3/9	N.W. 80 Shovel.....	8	18.22	\$145.76
	N.W. 80 Shovel.....	2	20.34	40.68
3/11	Welding Truck .....	10.5	8.225	86.36
	N.W. 80 Shovel.....	8.5	20.34	172.89
	D8 Dozer .....	10	10.20	102.00
3/14	Maintainer .....	1	6.50	6.50
3/15	Welding Truck .....	8	6.85	54.80
3/16	Welding Truck .....	2	6.85	13.70
3/17	Welding Truck .....	7	8.225	57.58
3/19	Welding Truck .....	8	6.85	54.80
	Welding Truck .....	4	8.225	32.90
3/20	Welding Truck .....	8	6.85	54.80
3/20	Welding Truck .....	2.5	8.225	20.56
3/21	Welding Truck .....	4	6.85	27.40
3/27	Welding Truck .....	7	6.85	47.95
3/28	Welding Truck .....	6	6.85	41.10
3/29	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2	10.20	20.40
3/30	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2	10.20	20.40
3/31	Dozer 342 .....	10	10.20	102.00
4/ 1	Dozer 342 .....	10	10.20	102.00
4/ 2	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	3	10.20	30.60
4/ 3	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	8.5	10.20	86.70
4/ 4	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2	10.20	20.40
4/ 5	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2	10.20	20.40
4/ 6	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2	10.20	20.40
4/ 7	Dozer 342 .....	13	10.20	132.60
4/ 9	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2	10.20	20.40
4/10	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2	10.20	20.40
	Truck Crane .....	5	12.50	62.50
4/11	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	3.5	10.20	35.70
4/12	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	3	10.20	30.60



Date	Description	Total Hours	Rate	Amount
4/12	N.W. 6 Shovel.....	4	11.725	\$46.90
4/13	Dozer 342 .....	6	9.375	56.25
4/14	Dozer 342 .....	5	10.20	51.00
4/18	N.W. 6 Shovel.....	4	11.725	46.90
4/19	Dozer 342 .....	8	9.375	75.00
4/19	Dozer 342 .....	4	10.20	40.80
4/20	Dozer 342 .....	8	9.375	75.00
	Dozer 342 .....	2.5	10.20	25.50
4/21	Dozer 342 .....	10	10.20	102.00
5/15	Truck Crane .....	1	12.50	12.50
5/17	Truck Crane .....	2.5	12.50	31.25
5/18	Truck Crane .....	1.5	12.50	18.75
5/19	Truck Crane .....	2.5	14.05	35.13
	Dozer 322 .....	.5	10.20	5.10
	Tournapull .....	.5	11.825	5.91
	Maintainer .....	.5	7.33	3.67
Total .....				\$3,989.41

SCHEDULE VIII

Equipment Rental. Not Fully Operated. Basich Brothers Construction Co., 3/29/45 to 6/9/45, \$2,773.86

Rental of Equipment by Basich Brothers Construction Company Not Fully Operated

Owner of Equipment—Basich Brothers Construction Company

Description	From	To	Rate	Amount
Symons Screen 3x10 .....	3/29/45	6/9/45	175.00	\$414.13
Electric Motor .....	3/29/45	6/9/45	15.00	35.50
Conveyor 22" x 65'.....	3/29/45	6/9/45	65.00	153.87
Symons Screen .....	4/ 4/45	6/9/45	175.00	379.15
Symons Screen .....	4/ 6/45	6/9/45	175.00	367.49
Electric Motor .....	4/ 4/45	6/9/45	15.00	32.50
Electric Motor .....	4/ 6/45	6/9/45	15.00	31.50
Conveyor 30" .....	4/ 4/45	6/9/45	65.00	140.85
D-17000 Generator .....	3/29/45	6/9/45	445.00	1,053.13
Bunker .....	3/29/45	6/9/45	35.00	82.87
Bunker .....	3/29/45	6/9/45	35.00	82.87
Total .....				\$2,773.86

## SCHEDULE IX

Equipment Rental. Royalty Basis. Basich Brothers  
Construction Co., \$4,191.60

Rental of Equipment on Royalty Basis

Owner of Equipment—Basich Brothers Construction Company

Description	Quantity	Rate	Amount
Pioneer Crusher (Rock Base)	7,102 cu. yds.	\$0.10	\$ 710.00
Pioneer Crusher (Min. Aggr.)	6,071 tons	0.10	607.10
Pioneer Crusher (Conc. Aggr.)	27,750 cu. yds.	0.10	2,775.00
Hot Plant (Sand)	995 tons	0.10	99.50
Total .....			\$4,191.60

## SCHEDULE X

Equipment Rental. Fully Operated. P. D. O. C.,  
2/12/45 to 5/19/45, \$6,902.37. Not Fully Oper-  
ated, 5/9/45 to 6/10/45, \$261.34

Rental of Equipment by Basich Brothers Construction Company  
From Others for Duque & Frazzini

Owner of Equipment—P. D. O. C.—Rented Fully Operated

Date	Description	Total Hours	Rate	Amount
2/12/45	Tournacrane .....	5	10.00	\$50.00
2/19/45	R. U. Carryall .....	4	6.025	24.10
2/20/45	R. U. Carryall .....	6.5	6.025	39.16
2/21/45	R. U. Carryall .....	8	6.025	48.20
2/22/45	R. U. Carryall .....	8	6.025	48.20
2/26/45	Tournacrane .....	5	10.00	50.00
3/ 8/45	Dozer 501 .....	8	9.375	75.00
3/14/45	Dozer 501 .....	2.5	9.375	23.44
3/15/45	Dozer 501 .....	8	9.375	75.00
3/16/45	Dozer 501 .....	5	9.375	46.88
3/17/45	Dozer 501 .....	9.5	10.20	96.90
3/18/45	Dozer 501 .....	4.5	10.20	45.90
3/19/45	Dozer 501 .....	2	9.375	18.75
3/20/45	Dozer 501 .....	5	9.375	46.88
3/21/45	Dozer 501 .....	1	9.375	9.38

Date	Description	Total Hours	Rate	Amount
3/24/45	Dozer 426 .....	2	10.20	\$20.40
3/28/45	Dozer 426 .....	1.5	9.375	14.06
3/29/45	Dozer 426 .....	1.5	9.375	14.06
3/30/45	Dozer 426 .....	1.5	9.375	14.06
4/ 5/45	Dozer 428 .....	8	9.375	} 75.00 } 45.90
4/ 5/45	Dozer 428 .....	4.5	10.20	
4/ 8/45	Dozer 502 .....	5	10.20	51.00
4/ 9/45	Dozer 502 .....	8	9.375	75.00
4/ 9/45	Dozer 502 .....	2	10.20	20.40
4/11/45	Dozer 502 .....	8	9.375	75.00
4/11/45	Dozer 502 .....	3.5	10.20	35.70
4/12/45	Dozer 502 .....	8	9.375	75.00
4/12/45	Dozer 502 .....	7	10.20	71.40
4/13/45	Dozer 428 .....	8	9.375	75.00
4/13/45	Dozer 428 .....	3.5	10.20	35.70
4/13/45	Shovel 510 .....	4.5	12.38	55.71
4/13/45	Dozer 502 .....	8	9.375	75.00
4/13/45	Dozer 502 .....	5	10.20	51.00
4/14/45	Dozer 502 .....	7	10.20	71.40
4/14/45	Dozer 428 .....	10.5	10.20	107.10
4/15/45	Dozer 502 .....	10	10.20	102.00
4/16/45	Dozer 502 .....	8	9.375	75.00
4/16/45	Dozer 502 .....	4	10.20	40.80
4/17/45	Dozer 502 .....	8	9.375	75.00
4/17/45	Dozer 502 .....	1	10.20	10.20
4/18/45	Dozer 428 .....	8	9.375	75.00
4/18/45	Dozer 428 .....	2.5	10.20	25.50
4/18/45	Dozer 502 .....	4.5	9.375	42.19
4/19/45	Dozer 428 .....	5	9.375	46.88
4/19/45	Dozer 502 .....	8	9.375	75.00
4/19/45	Dozer 502 .....	4	10.20	40.80
4/20/45	Dozer 502 .....	8	9.375	75.00
4/20/45	Dozer 502 .....	3	10.20	30.60
4/20/45	Dozer 428 .....	5	9.375	46.88
4/21/45	Dozer 428 .....	5	10.20	51.00
4/21/45	Dozer 502 .....	12	10.20	122.40
4/22/45	Dozer 502 .....	11	10.20	112.20
4/22/45	Dozer 428 .....	5	10.20	51.00
4/23/45	Dozer 502 .....	8	9.375	75.00
4/23/45	Dozer 502 .....	4.5	10.20	45.90

[ Written Notation—Bracketed ] \$104.50. LRY, J.

*Glens Falls Indemnity Co. vs.*

Date	Description	Total Hours	Rate	Amount
4/23/45	Dozer 428 .....	5	9.375	\$46.88
4/24/45	Dozer 502 .....	8	9.375	75.00
4/24/45	Dozer 502 .....	.5	10.20	5.10
4/24/45	Dozer 428 .....	4	9.375	37.50
4/25/45	Dozer 428 .....	4	9.375	37.50
4/25/45	Dozer 322 .....	8	9.375	75.00
4/25/45	Dozer 322 .....	2	10.20	20.40
4/25/45	Dozer 502 .....	8	9.375	75.00
4/26/45	Dozer 322 .....	8	9.375	75.00
4/26/45	Dozer 322 .....	2.5	10.20	25.50
4/26/45	Dozer 428 .....	8	9.375	75.00
4/26/45	Dozer 428 .....	3.5	10.20	35.70
4/26/45	Dozer 502 .....	8	9.375	75.00
4/27/45	Dozer 322 .....	8	9.375	75.00
4/27/45	Dozer 322 .....	3.5	10.20	35.70
4/27/45	Dozer 428 .....	3	9.375	28.13
4/27/45	Dozer 592 .....	8	9.375	75.00
4/27/45	Dozer 592 .....	6	10.20	61.20
4/28/45	Dozer 322 .....	10	10.20	102.00
4/28/45	Dozer 428 .....	3	10.20	30.60
4/28/45	Dozer 502 .....	10	10.20	102.00
4/29/45	Dozer 502 .....	10.5	10.20	107.10
4/29/45	Dozer 428 .....	3	10.20	30.60
4/29/45	Dozer 322 .....	9.5	10.20	96.90
4/30/45	Dozer 428 .....	3	9.375	28.13
4/30/45	Dozer 502 .....	8	9.375	75.00
5/ 1/45	Dozer 428 .....	3	9.375	28.13
4/30/45	Dozer 502 .....	2.5	10.20	25.50
5/ 1/45	Dozer 322 .....	8	9.375	75.00
5/ 1/45	Dozer 322 .....	2.5	10.20	25.50
5/ 2/45	Dozer 428 .....	4	9.375	37.50
5/ 2/45	Dozer 322 .....	8	9.375	75.00
5/ 2/45	Dozer 322 .....	2.5	10.20	25.50
5/ 3/45	Dozer 322 .....	8	9.375	75.00
5/ 3/45	Dozer 322 .....	2.5	10.20	25.50
5/ 3/45	Dozer 428 .....	3	9.375	28.13
5/ 4/45	Dozer 428 .....	6	9.375	56.25
5/ 4/45	Dozer 322 .....	8	9.375	75.00
5/ 4/45	Dozer 322 .....	4	10.20	40.80
5/ 5/45	Dozer 322 .....	4	10.20	40.80
5/ 6/45	Dozer 428 .....	4	10.20	40.80

Date	Description	Total Hours	Rate	Amount
5/ 6/45	Dozer 322 .....	12	10.20	\$122.40
5/ 7/45	Dozer 428 .....	4	9.375	37.50
6/ 7/45	Dozer 322 .....	8	9.375	75.00
5/ 7/45	Dozer 322 .....	4.5	10.20	45.90
5/ 8/45	Dozer 428 .....	8	9.375	75.00
5/ 8/45	Dozer 428 .....	5	10.20	51.00
5/ 8/45	Dozer 322 .....	2	9.375	18.75
5/ 9/45	Dozer 428 .....	8	9.375	75.00
5/ 9/45	Dozer 428 .....	4	10.20	40.80
5/ 9/45	Dozer 322 .....	2.5	9.375	23.44
5/10/45	Dozer 428 .....	8	9.375	75.00
5/10/45	Dozer 428 .....	4.5	10.20	45.90
5/10/45	Dozer 322 .....	2	9.375	18.75
5/11/45	Dozer 428 .....	8	9.375	75.00
5/11/45	Dozer 428 .....	4	10.20	40.80
5/11/45	Dozer 322 .....	2	9.375	18.75
5/12/45	Dozer 428 .....	8.5	10.20	86.70
5/13/45	Dozer 428 .....	13	10.20	132.60
5/14/45	Dozer 428 .....	8	9.375	75.00
5/14/45	Dozer 428 .....	2.5	10.20	25.50
5/15/45	Dozer 428 .....	8	9.375	75.00
5/15/45	Dozer 428 .....	2.5	10.20	25.50
5/16/45	Dozer 322 .....	8	9.375	75.00
5/16/45	Dozer 322 .....	2.5	10.20	25.50
5/16/45	Dozer 428 .....	8	9.375	75.00
5/16/45	Dozer 428 .....	4	10.20	40.80
5/17/45	Dozer 428 .....	8	9.375	75.00
5/17/45	Dozer 428 .....	4.5	10.20	45.90
5/18/45	Dozer 428 .....	8	9.375	75.00
5/18/45	Dozer 428 .....	3	10.20	30.60
5/19/45	Dozer 428 .....	4.5	10.20	45.90
Total .....				\$6,902.37

## Equipment Rented Not Fully Operated

Description	From	To	Rate	Amount
D-13000 Power Unit.....	5/9/45	6/10/45	245.00	\$261.34

## SCHEDULE XI

Equipment Rental. Fully Operated by Basich  
Brothers, J. J. North & Sons. 2/21/45 to 6/6/45,  
\$4,956.06

Rental of Equipment by Basich Brothers Construction Co.  
From Others for Duque & Frazzini  
Fully Operated by Basich Brothers  
Owner of Equipment—J. J. North & Sons

Date	Description	Total Hours	Rate	Amount
2/21/45	North 5 yd. Dump....	5	4.13	\$20.65
2/22/45	5 yd. Dump.....	3.5	4.13	14.46
2/23/45	5 yd. Dump.....	6	4.13	24.78
2/24/45	5 yd. Dump.....	6.5	4.13	26.85
2/26/45	5 yd. Dump.....	6.5	4.13	26.85
2/27/45	5 yd. Dump.....	8.5	4.13	35.11
2/28/45	5 yd. Dump.....	8.5	4.13	35.11
3/ 1/45	5 yd. Dump.....	1	4.13	4.13
3/ 2/45	5 yd. Dump.....	8.5	4.13	35.11
3/ 3/45	5 yd. Dump.....	9	4.13	37.17
3/26/45	Winch Truck .....	5.5	3.00	16.50
3/29/45	5 yd. Dump.....	40	4.13	165.20
3/30/45	5 yd. Dump.....	78.5	4.13	324.21
3/31/45	5 yd. Dump.....	76.5	4.13	315.95
4/ 1/45	5 yd. Dump.....	94.5	4.13	390.29
4/ 2/45	5 yd. Dump.....	55	4.13	227.15
4/ 3/45	5 yd. Dump.....	18.5	4.13	76.41
4/ 4/45	5 yd. Dump.....	71	4.13	293.23
4/ 5/45	5 yd. Dump.....	32.5	4.13	134.23
4/ 6/45	5 yd. Dump.....	72	4.13	297.36
4/ 7/45	5 yd. Dump.....	80.5	4.13	332.47
4/ 9/45	5 yd. Dump.....	38.5	4.13	159.01
4/10/45	5 yd. Dump.....	17.5	4.13	72.28
4/11/45	5 yd. Dump.....	28.5	4.13	117.71
4/13/45	5 yd. Dump.....	3.5	4.13	14.46
4/14/45	5 yd. Dump.....	5.5	4.13	22.72
4/16/45	6 yd. Dump.....	1	4.40	4.40
4/17/45	5 yd. Dump.....	20	4.13	82.60
	Winch Truck .....	2	3.00	6.00
4/18/45	5 yd. Trucks .....	40	4.13	165.20
4/19/45	5 yd. Trucks .....	31.5	4.13	88.80

Date	Description	Total Hours	Rate	Amount
4/20/45	5 yd. Trucks .....	27	4.13	\$111.51
	Winch Truck .....	2	3.00	6.00
4/21/45	6 yd. Truck.....	10	4.40	44.00
	5 yd. Truck.....	28.5	4.13	117.71
4/22/45	5 yd. Truck.....	.5	4.13	2.07
4/23/45	6 yd. Truck.....	9	4.40	39.60
	5 yd. Truck.....	23	4.13	94.99
4/24/45	5 yd. Truck.....	2	4.13	8.26
4/25/45	5 yd. Truck.....	7.5	4.13	30.98
4/26/45	5 yd. Truck.....	3.5	4.13	14.46
	Winch Truck .....	8	3.00	24.00
4/27/45	5 yd. Dumps.....	24.5	4.13	101.19
	6 yd. Dumps.....	8	4.40	35.20
	Winch Truck .....	1.5	3.00	4.50
4/28/45	5 yd. Dumps.....	37	4.13	152.81
	6 yd. Dumps.....	12	4.40	52.80
4/29/45	5 yd. Dumps.....	35	4.13	144.55
	6 yd. Dumps.....	12	4.40	52.80
4/30/45	Winch Truck .....	2	3.00	6.00
	5 yd. Dumps.....	12	4.13	49.56
	6 yd. Dumps.....	12	4.40	52.80
5/ 1/45	5 yd. Dumps.....	10	4.13	41.30
	6 yd. Dumps.....	11.5	4.40	50.60
5/ 2/45	5 yd. Dumps.....	3	4.13	12.39
5/ 2/45	Winch Truck .....	3	3.00	9.00
5/ 3/45	5 yd. Trucks.....	3	4.13	12.39
5/ 4/45	5 yd. Trucks.....	2	4.13	8.26
5/ 7/45	Winch Truck .....	2.5	3.00	7.50
5/ 8/45	5 yd. Dumps.....	1	4.13	4.13
5/11/45	5 yd. Dumps.....	4	4.13	16.52
5/14/45	Winch Truck .....	1.5	3.00	4.50
5/18/45	Winch Truck .....	2	3.00	6.00
5/19/45	5 yd. Trucks.....	6	4.13	24.78
5/20/45	Winch Truck .....	10	3.00	30.00
5/22/45	Winch Truck .....	2.5	3.00	7.50
5/25/45	Winch Truck .....	1.5	3.00	4.50
6/ 6/45	Winch Truck .....	1.5	3.00	4.50
<b>Total .....</b>				<b>\$4,956.06</b>

## SCHEDULE XII

Equipment Rental. Fully Operated. B. B. Bonner,  
4/6/45 to 4/24/45, \$625.74

Rental of Equipment by Basich Brothers Construction Company  
From Others for Duque & Frazzini

Owner of Equipment: B. B. Bonner—Rented Fully Operated

Date	Description	Total Hours	Rate	Amount
5/ 6/45	D-7 Dozer .....	2	7.575	\$15.15
4/ 9/45	D-7 Dozer .....	1	7.575	7.58
4/10/45	D-7 Dozer .....	8	7.575	60.60
4/10/45	D-7 Dozer .....	2	8.40	16.80
4/11/45	D-7 Dozer .....	8	7.575	60.60
4/11/45	D-7 Dozer .....	1	8.40	8.40
4/12/45	D-7 Dozer .....	3	7.575	22.73
4/13/45	D-7 Dozer .....	8	7.575	60.60
4/14/45	D-7 Dozer .....	10	8.40	84.00
4/16/45	D-7 Dozer .....	8	7.575	60.60
4/16/45	D-7 Dozer .....	3.5	8.40	29.40
4/17/45	D-7 Dozer .....	2.5	7.575	18.94
4/22/45	D-7 Dozer .....	12	8.40	100.80
4/23/45	D-7 Dozer .....	8	7.575	60.60
4/24/45	D-7 Dozer .....	2.5	7.575	18.94
Total .....				\$ 625.74

## SCHEDULE XIII

Equipment Rental. Not Fully Operated. Bressi  
& Bevanda. 4/24/45 to 6/9/45, \$582.72

Rental of Equipment by Basich Brothers Construction Company  
From Others for Duque & Frazzini

Owner of Equipment—Bressi & Bevanda  
Rented Not Fully Operated

Description	From	To	Rate	Amount
D-13000 with Generator....	4/24/45	6/9/45	380.00	\$582.72



SCHEDULE XIV

Equipment Rental. Not Fully Operated. Industrial Equipment Co., 4/6/45 to 5/8/45, \$176.00

Rental of Equipment by Basich Brothers Construction Company  
From Others for Duque & Frazzini

Owner of Equipment—Industrial Equipment Co.  
Rented Not Fully Operated

Description	From	To	Rate	Amount
McCormick-Deering Power Unit .....	4/6/45	5/8/45	165.00	\$176.00

SCHEDULE XV

Equipment Rental. Fully Operated. Basich Brothers Construction Co., 6/9/45 to 9/16/45, \$18,485.17

SCHEDULE XVI

Basich Brothers Construction. Equipment Rental. Not Fully Operated. 6/9/45 to 9/8/45, \$2,849.56

SCHEDULE XVII

Basich Brother Construction Co. Equipment Rental. Royalty Basis, \$6,753.20

Rental of Equipment by Basich Brothers Construction Company on Royalty Basis

Description	Tonnage	Rate	Amount
Pioneer Crusher (Base).....	6036	0.10	\$603.60
Pioneer Crusher (Min. Aggr.).....	19,283	0.10	1,928.30
Pioneer Crusher (Conc. Aggr.).....	39,990	0.10	3,999.00
Hot Plant (Sand) .....	2,223	0.10	222.30
Total .....			\$6,753.20

## SCHEDULE XVIII

Equipment Rental. Not Fully Operated. P. D. O. C.,  
6/15/45 to 9/17/45, \$108.50

## SCHEDULE XIX

Equipment Rental. Fully Operated. P. D. O. C.,  
6/9/45 to 9/6/45, \$10,412.57

## SCHEDULE XX

Equipment Rental. Royalty Basis.  
P. D. O. C., \$5,349.73

Rental of Equipment by Basich Brothers Construction Company  
From Others for Duque & Frazzini

Owner of Equipment: P. D. O. C.—Royalty Basis

Description	Tonnage	Rate	Amount
P.D.O.C. Pioneer Crusher.....	23602 tons	0.17	\$5,349.73
	(31469) loose		

## SCHEDULE XXI

Equipment Rental. Fully Operated. J. G. North  
& Sons. 6/8/45 to 9/12/45, \$27,809.54

## SCHEDULE XXII

Equipment Rental. Fully Operated. Phoenix Tempe  
Stone Co. 6/15/45 to 8/9/45, \$6,102.05

## SCHEDULE XXIII

Equipment Rental. Not Fully Operated. Bressi  
& Bevanda. 6/9/45 to 9/10/45, \$1152.61

SCHEDULE XXIV

Equipment Rental. Not Fully Operated. Martin Construction Co. 6/15/45 to 9/8/45, \$270.00

SCHEDULE XXV

Equipment Rental. Not Fully Operated. Axman-Miller Construction Co. 7/6/45 to 9/17/45, \$700.00

SCHEDULE XXVI

Repairs Made by Others on Basich Brothers Construction Co. Equipment. Not Fully Operated, \$275.51

SCHEDULE XXVII

Parts Purchased for Basich Brothers Construction Co. Equipment. Not Fully Operated. 2/14/45 to 6/4/45, \$2,257.88

Parts Purchased for Basich Brothers Construction Co. Equipment Not Fully Operated

Invoice Date	Company	Invoice No.	Amount
2/14/45	Abbey Scherer Co.....	F-89	\$ 82.13
3/ 1/45	Abbey Scherer Co. ....	F-123	193.37
3/ 2/45	Symons Brothers Screen Co.	S-7419	160.72
3/ 8/45	Abbey Scherer Co.....	F-137	31.09
3/24/45	Abbey Scherer Co.....	F-176	176.45
3/31/45	Abbey Scherer Co.....	F-190	115.80
4/ 2/45	Abbey Scherer Co.....	F-194	62.10
4/ 2/45	Victor Belting & Rubber Co.	6594	4.83
4/ 6/45	Abbey Scherer Co.....	F-202	174.67
4/10/45	F. Ronstadt .....	A15095	10.44
4/13/45	Symons Brothers Screen Co.	S7502	37.67
4/13/45	Symons Brothers Screen Co.	S7503	80.36

Invoice Date	Company	Invoice No.	Amount
4/13/45	Symons Brothers Screen Co.	S7503	\$ 34.44
4/30/45	Symons Brothers Screen Co.	S7539	139.14
5/ 4/45	Harron Rickard & McCone..	50098	16.16
5/12/45	Harron Rickard & McCone..	50117	174.59
5/ 7/45	Brown-Bevis Equipment Co.	74543	398.42
4/21/45	Abbey Scherer Co.....	F-245	34.09
4/30/45	Abbey Scherer Co.....	F-267	121.89
6/ 7/45	Abbey Scherer Co.....	F-379	57.90
6/ 4/45	Victor Belting & Rubber Co.	8029	151.62
Total .....			\$2,257.88

## SCHEDULE XXVIII

Parts Taken From Basich Brothers  
Construction Co. Stock, \$1,723.75

## SCHEDULE XXIX

Fuel, Grease and Oil on Equipment Not  
Fully Operated. 4/9/45 to 5/31/45, \$732.47

## SCHEDULE XXX

Miscellaneous Labor, Invoices, Etc.  
2/26/45 to 6/16/45, \$2,814.24

Miscellaneous Labor, Invoices, Etc.

Date	Description	Labor	Invoice Amount	Ins. on Labor
2/26/45	Move & Set up Pioneer	33.69		
2/28/45	“ “ “ “ “	41.60		
3/ 1/45	“ “ “ “ “	21.80		
3/ 2/45	“ “ “ “ “	29.60		
3/ 3/45	“ “ “ “ “	46.71		
3/ 4/45	“ “ “ “ “	46.71		
3/ 5/45	“ “ “ “ “	14.80		

Date	Description	Labor	Invoice Amount	Ins. on Labor
3/ 6/45	Move & Set Up Pioneer	45.80		
3/ 7/45	“ “ “ “ “	52.55		
3/ 8/45	“ “ “ “ “	39.60		
3/ 9/45	“ “ “ “ “	80.65		
3/10/45	“ “ “ “ “	115.73		
3/11/45	“ “ “ “ “	142.20		
3/12/45	“ “ “ “ “	106.31		
3/13/45	“ “ “ “ “	98.44		
3/14/45	“ “ “ “ “	88.84		
3/15/45	“ “ “ “ “	91.46		
3/16/45	“ “ “ “ “	91.46		
3/17/45	“ “ “ “ “	74.64		
3/18/45	“ “ “ “ “	77.27		
3/19/45	“ “ “ “ “	78.93		
3/20/45	“ “ “ “ “	72.97		
3/21/45	“ “ “ “ “	64.82		
3/22/45	“ “ “ “ “	46.64		
3/27/45	“ “ “ “ “	92.84		
3/28/45	“ “ “ “ “	113.82		
3/29/45	North Drivers Overtime	4.00		
3/30/45	“ “ Show up	2.00		
	“ “ Overtime	7.25		
3/31/45	“ “ “	39.02		
4/ 1/45	“ “ “	47.25		
4/ 3/45	“ “ Downtime	9.50		
4/ 4/45	“ “ “	3.00		
	“ “ Overtime	7.00		
4/ 6/45	“ “ “	5.25		
4/ 7/45	“ “ “	40.25		
	“ “ Downtime	.50		
4/ 9/45	“ “ “	1.00		
	“ “ Overtime	1.25		
4/10/45	“ “ “	.25		
	“ “ Downtime	5.50		
4/11/45	“ “ “	1.50		
	“ “ Overtime	3.50		
4/14/45	“ “ “	2.75		
4/18/45	“ “ Show up	6.00		
	“ “ Overtime	4.00		
4/19/45	“ “ “	3.00		

*Glens Falls Indemnity Co. vs.*

Date	Description	Labor	Invoice Amount	Ins. on Labor
4/20/45	North Drivers Overtime	1.50		
4/21/45	“ “ “	20.00		
	“ “ Downtime	1.50		
4/22/45	“ “ Overtime	.25		
4/23/45	“ “ “	1.50		
4/24/45	“ “ Show up	6.00		
4/25/45	“ “ “	6.00		
	“ “ Downtime	2.00		
	“ “ Overtime	.25		
4/27/45	“ “ “	.25		
4/28/45	“ “ “	26.50		
	“ “ Downtime	4.00		
4/29/45	“ “ “	3.50		
4/29/45	“ “ Overtime	23.50		
4/30/45	“ “ “	4.00		
4/30/45	Tucson Mac. E. Eng.....		121.88	
6/13/45	H. S. Thompson Exp. Acc't.		49.69	
6/16/45	H. S. Thompson Exp. Acc't.		235.53	
	Phone Charges .....		92.30	
	10% Insurance on labor			210.44
	Totals .....	\$2,104.40	\$499.40	\$210.44
	Grand Total .....			\$2,814.24

## SCHEDULE XXXI

Freight on Rented Equipment, \$326.89

## SCHEDULE XXXII

Repairs Made by Others on Basich Brothers Construction Co. Equipment. Not Fully Operated.

6/9/45 to 9/10/45, \$3,969.97

SCHEDULE XXXIII

Parts Purchased for Basich Brothers Construction Co. Equipment. Not Fully Operated. 6/16/45 to 9/18/45, \$3,215.19

SCHEDULE XXXIV

Parts Taken From Basich Brothers Construction Company Stock, \$1,028.91

SCHEDULE XXXV

Fuel, Grease and Oil on Equipment Not Fully Operated. 6/7/45 to 9/6/45, \$1,371.50

SCHEDULE XXXVI

Miscellaneous Labor, Invoices, Etc.  
6/7/45 to 9/17/45, \$4,803.15

Miscellaneous Labor, Invoices, Etc.

Date	Description	Labor	Invoice Amount	Ins. on Labor
6/ 7/45	Move & Set up P.D.O.C. Plant		2,500.00	
6/ 9/45	North Drivers Overtime	17.00		
6/10/45	“ “ Overtime	43.75		
	“ “ Downtime	40.00		
6/11/45	“ “ Overtime	10.00		
	“ “ Downtime	11.00		
6/12/45	“ “ Overtime	14.00		
	“ “ Downtime	14.50		
6/13/45	“ “ Overtime	13.25		
	“ “ Downtime	13.50		
6/14/45	“ “ Overtime	24.75		
	“ “ Downtime	10.00		
6/15/45	“ “ Overtime	7.25		
	“ “ Downtime	21.50		

Date	Description	Labor	Invoice Amount	Ins. on Labor
6/16/45	North Drivers Overtime	77.50		
6/17/45	“ “ “	29.50		
6/18/45	“ “ “	17.75		
	“ “ Downtime	26.00		
6/19/45	“ “ Overtime	21.75		
	“ “ Downtime	16.00		
6/20/45	“ “ Overtime	21.00		
	“ “ Downtime	8.00		
6/21/45	“ “ Overtime	22.25		
	“ “ Downtime	20.00		
6/22/45	“ “ Overtime	23.00		
	“ “ Downtime	4.50		
6/23/45	“ “ Overtime	77.75		
	“ “ Downtime	7.50		
6/24/45	“ “ Overtime	93.75		
	“ “ Downtime	5.50		
6/25/45	“ “ Overtime	20.75		
	“ “ Downtime	4.50		
6/26/45	“ “ Overtime	10.00		
	“ “ Downtime	6.00		
6/27/45	“ “ Overtime	12.75		
	“ “ Downtime	9.00		
6/28/45	“ “ Overtime	11.75		
	“ “ Downtime	1.00		
6/29/45	“ “ Overtime	11.00		
	“ “ Downtime	2.50		
6/30/45	“ “ Overtime	66.25		
	“ “ Downtime	33.50		
7/ 1/45	“ “ Overtime	46.00		
	“ “ Downtime	11.50		
7/ 2/45	“ “ Overtime	14.00		
	“ “ Downtime	33.00		
7/ 3/45	“ “ Overtime	13.50		
	“ “ Downtime	27.50		
7/ 4/45	“ “ Overtime	65.00		
7/ 5/45	“ “ “	8.50		
	“ “ Downtime	36.00		
7/ 6/45	“ “ Overtime	9.00		
7/ 7/45	“ “ “	35.75		



Date	Description	Labor	Invoice Amount	Ins. on Labor
	North Drivers Downtime		11.00	
7/ 8/45	“ “ Overtime		45.00	
	“ “ Downtime		4.50	
7/ 9/45	“ “ Overtime		9.00	
	“ “ Downtime		1.00	
7/10/45	“ “ Overtime		3.00	
	“ “ Downtime		4.00	
7/11/45	“ “ Overtime		11.00	
7/12/45	“ “ Downtime		35.50	
7/13/45	“ “ “		13.00	
7/14/45	“ “ Overtime		42.00	
	“ “ Downtime		24.00	
7/15/45	“ “ Overtime		43.75	
	“ “ Downtime		4.00	
7/16/45	“ “ Overtime		14.00	
7/17/45	“ “ “		12.00	
	“ “ Downtime		4.00	
7/18/45	“ “ “		25.00	
	“ “ “		15.00	
7/19/45	“ “ Overtime		13.50	
	“ “ Downtime		12.00	
7/20/45	“ “ Overtime		8.25	
	“ “ Downtime		13.50	
7/21/45	“ “ Overtime		52.00	
	“ “ Downtime		5.00	
7/23/45	“ “ Overtime		9.25	
	“ “ Downtime		10.50	
7/24/45	“ “ “		10.00	
7/25/45	“ “ Overtime		10.00	
	“ “ Downtime		41.50	
7/26/45	“ “ Overtime		10.00	
7/27/45	“ “ “		10.00	
	“ “ Downtime		25.00	
7/28/45	“ “ Overtime		15.00	
7/30/45	“ “ Downtime		8.50	
8/ 2/45	“ “ Overtime		9.00	
8/ 3/45	“ “ “		7.00	
8/ 4/45	“ “ “		34.75	
8/ 5/45	“ “ “		40.50	
8/ 6/45	“ “ “		7.75	
	“ “ Downtime		12.00	

Date	Description	Labor	Invoice Amount	Ins. on Labor
8/ 7/45	North Drivers Overtime	7.75		
8/ 8/45	“ “ “	7.75		
	“ “ Downtime	8.00		
8/ 9/45	“ “ Overtime	6.00		
	“ “ Downtime	6.00		
8/18/45	“ “ Overtime	13.50		
8/22/45	“ “ Downtime	3.00		
8/23/45	“ “ “	20.50		
8/25/45	“ “ Overtime	40.75		
	“ “ Downtime	5.50		
8/26/45	“ “ Overtime	35.00		
	“ “ Downtime	3.50		
8/27/45	“ “ Overtime	5.75		
	“ “ Downtime	3.50		
8/28/45	“ “ “	3.50		
8/29/45	“ “ Overtime	10.25		
8/30/45	“ “ Downtime	8.00		
	“ “ Overtime	8.25		
9/ 4/45	“ “ Downtime	7.00		
	“ “ Overtime	6.75		
9/ 6/45	“ “ “	4.75		
9/12/45	“ “ “	2.00		
9/17/45	Load Axman-Miller Screen		17.00	
	Ins. on Labor			
	2103.75 @ 8.67 per hun.			182.40
	Total .....	\$2,103.75	\$2,517.00	\$182.40
	Grand Total.....			\$4,803.15

## SCHEDULE XXXVII

Freight on Rented Equipment, \$663.39

## SCHEDULE XXXVIII

Production. Gravel Base, \$25,191.44

Production—Item 15

Gravel Base

Contract Price—\$0.46 c.y.

Estimate Date	Quantity	Credit
3/31/45	6,307 c.y.	\$2,901.22
4/15/45	11,662 c.y.	5,364.52
4/30/45	3,595 c.y.	1,653.70
5/15/45	11,140 c.y.	5,124.40
5/31/45	5,703 c.y.	2,623.38
6/ 8/45	533 c.y.	245.18
6/15/45	567 c.y.	214.82
6/15- 6/30/45	2,986 c.y.	1,373.56
7/ 1- 7/15/45	774 c.y.	356.04
7/16- 7/31/45		
8/ 1- 8/15/45		
6/15- 7/31 (Extension)	7,500 c.y.	3,450.00
8/ 1- 8/15/45		
8/16- 8/31/45	3,046 c.y.	1,401.16
8/ 1- 8/10/45 (Extension)	75 c.y.	34.50
8/31-10/ 8/45	976 c.y.	448.96
	<hr/>	<hr/>
	54,764 c.y.	\$25,191.44

## SCHEDULE XXXIX

Production. Gravel Stabilized Base, \$4,109.20

Production—Item 11

Gravel Stabilized Base Contract Price—\$0.40 c.y.

Estimate Date	Quantity	Credit
3/31/45	34,700 s.y.	
4/15/45	15,840 s.y.	
4/30/45	9,561 s.y.	
5/15/45	33,256 s.y.	
5/31/45	20,448 s.y.	
6/ 8/45	33,903 s.y.	
6/15- 6/30/45		
7/ 1- 7/15/45		
7/16- 7/31/45		
8/ 1- 8/15/45		
8/16- 8/31/45	3,792 s.y.	
8/31-10/ 8/45	2,602 s.y.	
	<hr/>	
	154,102 s.y.	
	or	
	10,273 c.y.	\$4,109.20

## SCHEDULE XXXX

Production. Gravel Embankment, \$4,719.60

Production—Item 9

Gravel Embankment

Contract Price—0.46 c.y.

Estimate Date	Quantity	Credit
3/31/45		
4/15/45	500 c.y.	\$ 230.00
4/30/45	500 c.y.	230.00
5/15/45	2,000 c.y.	920.00
5/31/45		
6/ 8/45		
6/15/45		

Estimate Date	Quantity	Credit
6/15- 6/30/45	1,900 c.y.	\$ 874.00
7/ 1- 7/15/45		
7/16- 7/31/45		
8/ 1- 8/15/45	595 c.y.	273.70
8/16- 8/31/45	3,566 c.y.	1,640.36
8/31-10/ 8/45	1,199 c.y.	551.54
	<hr/>	<hr/>
	10,260 c.y.	\$4,719.60

## SCHEDULE XXXXI

Production. Concrete Aggregate, \$70,710.52

Production—Items 21 & 22  
Concrete Aggregate  
Contract Price—\$1.05 c.y.

Estimate Date	Quantity	Credit
3/31/45		
4/15/45	2,630 c.y.	\$ 2,761.50
4/30/45	8,150 c.y.	8,557.50
5/15/45	2,600 c.y.	2,730.00
5/31/45	8,355.21 c.y.	8,772.97
6/ 8/45	5,189.22 c.y.	5,448.68
6/15/45	4,540.57 c.y.	4,767.60
6/15- 6/30/45	5,115 c.y.	5,370.75
7/ 1- 7/ 5/45	3,353 c.y.	3,520.65
7/16- 7/31/45		
8/ 1- 8/15/45	4,828 c.y.	5,069.40
6/15- 7/31 (Extension)	10,015.20 c.y.	10,515.96
8/ 1- 8/15/45	2,255 c.y.	2,367.75
8/16- 8/31/45	2,949 c.y.	3,096.45
8/ 1- 8/10/45 (Extension)	1,102.15	1,157.26
8/31-10/ 8/45	6,261 c.y.	6,574.05
	<hr/>	<hr/>
Total	67,343.35 c.y.	\$70,710.52

## SCHEDULE XXXXII

Production. Mineral Aggregate, \$15,377.93

Production—Items 26A &amp; 26B

Mineral Aggregate

Contract Price—\$0.65 Ton

Estimate Date	Quantity	Credit
3/31/45		
4/15/45		
4/30/45		
5/15/45	4,827 tons	\$ 3,137.55
5/31/45		
6/ 8/45		
6/15/45		
6/15- 6/30/45		
7/ 1- 7/15/45	5,731 tons	3,725.15
7/16- 7/31/45		
8/ 1- 8/15/45	9,112 tons	5,922.80
8/16- 8/31/45		
8/31-10/ 8/45	5,233.16	3,401.55
	<hr/>	<hr/>
	24,903.16 tons	16,187.05
Minus oil	1,244.81	Minus oil 809.12
	<hr/>	<hr/>
Total	23,658.35 tons	\$15,377.93

## SCHEDULE XXXXIII

Production. Concrete Aggregate for  
Structures, \$405.30

Production—Concrete Aggregate for Structures

Contract Price—\$1.05 c.y.

Estimate Date	Quantity	Credit
3/31/45		
4/15/45		
4/30/45		
5/15/45	20 c.y.	\$21.00

Estimate Date	Quantity	Credit
5/31/45	95 c.y.	\$99.75
6/ 8/45		
6/15/45		
6/15- 6/30/45	8.5 c.y.	8.92
7/ 1- 7/15/45	74.5 c.y.	78.23
7/16- 7/31/45		
6/15- 7/31/45 (Extension)	6 c.y.	6.30
8/ 1- 8/15/45	122 c.y.	128.10
8/16- 8/31/45	20 c.y.	21.00
8/31-10/ 8/45	40 c.y.	42.00
	<hr/>	
Total	386 c.y.	<hr/> \$405.30

SCHEDULE XXXIV

Miscellaneous Credits, \$1,319.96

Miscellaneous Credits

Item	Quantity	Rate	Credit
Sand for Seal Coat.....	751 tons	\$0.65 ton	\$488.15
Gravel Base Sold to A. C. LaRue Construction Co. for Strips Adjacent to Hanger .....	390 c.y.	0.46 c.y.	179.40
Gravel Base for 8" CMP.....	75 c.y.	0.46 c.y.	34.50
Credit—Maintainer Rental.....			525.00
Credit—Labor .....			92.91
			<hr/>
Total Credit .....			\$1,319.96

Received copy of the within this . . . . day of . . . .  
19 . . . . .

J. E. McCALL,

By JOSEPH J. BURRIS,

Attorney for Glens Falls  
Indemnity Company.

[Endorsed]: Filed July 1, 1946.

[Title of District Court and Cause.]

### NOTICE TO PRODUCE

To Basich Brothers Construction Company, a Corporation, Plaintiff, and to Stephen Monteleone, Esq., Plaintiff's Attorney:

You Are Hereby Notified and Required to produce at the pre-trial and also at the trial of the above-entitled cause, the following documents, to wit:

1. Employer's copy of all withholding returns with copies of withholding receipts attached to any of said returns, which were filed with the Internal Revenue Department covering employees [373] working on the alleged subcontract work of Duque & Frazzini;

2. Employer's copy of all Arizona State Employment insurance returns covering employees working on the alleged subcontract work of Duque & Frazzini;

3. Employer's copy of all returns made under the Federal Insurance Contributions Act (Social Security) covering employees working on the alleged subcontract work of Duque & Frazzini;

4. Policy of Insurance covering public liability and property damage on the alleged subcontract work of Duque & Frazzini;

5. Policy of Workmen's Compensation Insurance covering employees working on the alleged subcontract work of Duque & Frazzini;



6. Subcontract bond bearing date the 20th day of February, 1945, in which Duque & Frazzini are named as Principal, Glens Falls Indemnity Company is named as Surety and Basich Brothers Construction Co. is named as Obligee and letter bearing date March 7, 1945 addressed to Basich Bros. Construction Co., 600 So. Fremont Ave., Alhambra, Calif. from Glens Falls Indemnity Company, By Marwin F. Jonas, Attorney;

7. Daily record of all material produced by Duque & Frazzini between February 19, 1945 and June 8, 1945 inclusive, on the alleged subcontract work of Duque & Frazzini; [374]

8. Letter bearing date May 19, 1945 addressed to Basich Brothers Construction Co., Tucson, Arizona, by Duque and Frazzini, By A. Duque;

9. Letter bearing date June 7, 1945 addressed to Basich Brothers Construction Company, c/o Stephen Monteleone, Attorney, 714 West Olympic Boulevard, Los Angeles 15, California, by J. E. McCall;

10. Letter bearing date June 23, 1945 addressed to Basich Brothers Construction Company, c/o Mr. Stephen Monteleone, Attorney, 714 West Olympic Boulevard, Los Angeles 15, California, by J. E. McCall.

and you are further notified that in case of your failure to produce any of said documents, defendant

Glens Falls Indemnity Company, a corporation will offer secondary evidence of its contents.

Dated this 25th day of June, 1946.

/s/ JOHN E. McCALL,  
Attorney for Defendant Glens Falls Indemnity  
Company, a corporataion. [375]

Received copy of the within Notice to Produce this 27th day of June, 1946.

/s/ STEPHEN MONTELEONE,  
Attorney for Plaintiff.

[Endorsed]: Filed June 28, 1946.

---

[Title of District Court and Cause.]

REQUEST FOR ADMISSION UNDER  
RULE 36

Defendant Glens Falls Indemnity Company requests plaintiff Basich Brothers Construction Company to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, to-wit:

That each of the following statements is true:

1. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all withholding returns and withholding receipts which were filed with the Internal Revenue Depart-

ment covering employees working on the alleged subcontract [377] work of Duque & Frazzini.

2. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Arizona State Employment Insurance returns covering employees working on the alleged subcontract work of Duque & Frazzini.

3. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Social Security returns made under the Federal Insurance Contributions Act, covering employees working on the alleged subcontract work of Duque & Frazzini.

4. Basich Brother Construction Company, a corporation, plaintiff herein, is named as insured in all policies of insurance covering public liability and property damage on the alleged subcontract work of Duque & Frazzini.

5. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Workmen's Compensation Insurance policies covering employees working on the alleged subcontract work of Duque & Frazzini.

6. All wages and salaries of all employees performing labor or services on the alleged subcontract between the plaintiff herein and Duque & Frazzini, dated February 7, 1945, were paid by the plaintiff

Basich Brother Construction Company, a corporation.

Dated July 8, 1946.

/s/ JOHN E. McCALL,  
Attorney for Defendant Glens Falls Indemnity  
Company, a corporation.

Received copy of the within request for admission  
under Rule 36 this 8th day of July, 1946.

STEPHEN MONTELEONE,  
Attorney for Plaintiff.

[Endorsed]: Filed July 8, 1946. [378]

---

[Title of District Court and Cause.]

#### STIPULATION

It Is Hereby Stipulated by and between the plaintiff and the defendant Glens Falls Indemnity Company, a corporation, represented by their respective attorneys of record, that said defendant Glens Falls Indemnity Company, a corporation, may file the amended answer now lodged with the Clerk of the above-entitled Court, a true copy of which is hereto

attached, and service of a copy of said amended answer is hereby accepted.

Dated September 6th, 1946.

/s/ STEPHEN MONTELEONE,  
Attorney for Plaintiff.

/s/ JOHN E. McCALL,  
Attorney for Defendant Glens Falls Indemnity  
Company, a corporation.

It is so ordered: 9/9/46.

/s/ PEIRSON M. HALL,  
Judge.

[Endorsed]: Filed Sept. 9, 1946.

---

[Title of District Court and Cause.]

FIRST AMENDED ANSWER OF DEFEND-  
ANT GLENS FALLS INDEMNITY COM-  
PANY, A CORPORATION

Comes now Glens Falls Indemnity Company, a corporation, one of the defendants in the above-entitled action, and leave of court having been first had and obtained, files this its first amended answer to plaintiff's complaint herein, and for itself alone and not for its co-defendants nor either of them, admits, denies and alleges:

I.

This defendant admits the allegations contained in Paragraphs I, II and IV of said complaint.

## II.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III of said complaint.

## III.

Answering Paragraph V of said complaint, this defendant denies that a copy of the contract entered into between plaintiff and the United States of America referred to in said Paragraph V is too voluminous to attach to plaintiff's complaint as an exhibit, and denies that this defendant knows the contents thereof. This defendant admits each and every allegation in said Paragraph V not herein in this paragraph denied.

## IV.

Answering Paragraph VI of said complaint, this defendant admits that on or about the 7th day of February, 1945, plaintiff entered into an alleged subcontract with defendants Duque & Frazzini and that a copy of said alleged subcontract is attached to plaintiff's complaint marked Exhibit "A", but this defendant denies that said alleged subcontract contained or contains any terms, provisions or conditions other than those expressly set forth in the language of the alleged subcontract itself, a copy of which is attached to said complaint marked Exhibit "A". This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of said Paragraph VI not herein in this paragraph admitted or denied.

V.

Answering Paragraph VII of said complaint, this defendant admits that on or about the 20th day of February, 1945, it executed and delivered to plaintiff, within the Southern District of California, Central Division, a subcontract bond in the penal sum of \$101,745.55, wherein Duque & Frazzini were named as principal, and that on or about the 7th day of March, 1945, this [381] defendant addressed a letter to Basich Brothers Construction Company at Alhambra, California, which reads as follows:

“GLENS FALLS INDEMNITY COMPANY  
of Glens Falls, New York  
Los Angeles 13, California  
March 7th, 1945

RE: Duque & Frazzini to Basich Bros.  
Construction Co. Contract bond

Basich Bros Construction Co.  
600 So. Fremont Ave.  
Alhambra, Calif.

Gentlemen:

It is hereby understood and agreed that the 10 days appearing in paragraph ‘First’ is changed to read ‘Twenty (20) days’.

GLENS FALLS INDEMNITY  
COMPANY,

[Seal] By MARWIN F. JONAS,  
MARWIN F. JONAS,  
Attorney.”

This defendant admits that a copy of said subcontract bond is annexed to said complaint marked Exhibit "B", but this defendant denies that said bond then contained or now contains any terms, provisions, conditions or covenants other than those expressly set forth in the language of said subcontract bond itself.

This defendant denies each and every allegation of said Paragraph VII not hereinbefore in this paragraph admitted.

## VI.

Answering Paragraph VIII of said complaint, this defendant denies that said subcontract bond at any time became or remained or is now in full or any force or effect, and denies that plaintiff at any time duly or otherwise performed or complied with or fulfilled all or any of the conditions or stipulations in [382] said bond contained on its part to be performed, and says that plaintiff failed, among other things, to comply with the conditions precedent to any right of recovery by the plaintiff on said subcontract bond, in that:

Plaintiff failed to deliver to this defendant notice of default on the part of said subcontractor as required by the terms of said subcontract bond;

Plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed, contrary to the following express condition precedent contained in said subcontract bond "that the Surety



shall have the right within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract”;

Plaintiff failed to faithfully or otherwise perform all of the terms, covenants or conditions of said alleged subcontract on the part of plaintiff to be performed;

Plaintiff failed to retain the last payment payable by the terms of said alleged subcontract, without the consent of this defendant thereto in writing or otherwise;

Plaintiff failed to retain all or any reserves or deferred payments retainable by the plaintiff under the terms of said alleged subcontract, without the consent of this defendant thereto in writing or otherwise.

#### VII.

This defendant admits the allegations contained in Paragraph IX of said complaint.

#### VIII.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X of said complaint. [383]

#### IX.

Answering Paragraph XI of said complaint, this defendant admits that it has not paid any labor or equipment or material bills on account of labor performed or materials or equipment furnished in connection with any subcontract with plaintiff, and denies that any labor or materials or equipment were

furnished to or for this defendant, and denies that this defendant had or has any contract with plaintiff for the payment of any bills or the performance of any work whatever. This defendant admits that some time subsequent to the 5th day of April, 1945, the exact date whereof this defendant does not know, it received a copy of letter dated April 5th, 1945 addressed to Duque & Frazzini, Tonopah, Nevada, but denies that said letter contained any language other than that expressly set forth in the letter itself, a copy of which is hereunto attached, marked Exhibit "1" and made a part hereof, and denies that said letter constituted notice to this defendant as required by the terms of the subcontract bond.

#### X.

Answering Paragraph XII of said complaint, this defendant denies that it fully or at all investigated any facts or conditions relative to any default by said subcontractor, either through its duly authorized agents or representatives or otherwise, or that it was thereby or otherwise fully or at all advised as to any facts thereto appertaining. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of said Paragraph XII not herein in this paragraph admitted or denied.

#### XI.

Answering Paragraph XIII of said complaint, this defendant admits that it received a letter from plaintiff, by and through plaintiff's attorney Stephen Monteleone, dated April 27th, 1945, but this

defendant denies that said letter contained any language [384] other than that expressly set forth in the letter itself, a copy of which is hereunto attached marked Exhibit "2", and made a part hereof. This defendant denies that said letter constituted notice to this defendant as required by the terms of the subcontract bond. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations in said Paragraph XIII not herein in this paragraph admitted or denied.

## XII.

Answering Paragraph XIV of said complaint, this defendant denies that by reason of the failure of Duque & Frazzini to perform faithfully the work contracted to be done under their said contract with plaintiff, or at their own expense to furnish all necessary material or perform all necessary labor incidental thereto, or for any other reason or at all, it became necessary for plaintiff to furnish any labor or material or equipment for the purpose of completing the work contracted to be done by Duque & Frazzini or for any other purpose, and this defendant denies that at any time or for any reason or at all, it became necessary for plaintiff to pay for any materials, or supplies or equipment used or employed by said Duque & Frazzini during the period from on or about February 19th, 1945 to on or about June 8th, 1945 or at any other time, for the purpose of completing the work contracted to be done by said Duque & Frazzini under said subcontract or for any other purpose.

## XIII.

Answering Paragraph XV of said complaint, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained, and on that ground denies that plaintiff paid for labor or materials or supplies or equipment in the amounts set forth in said paragraph or any other sums or amounts, and on said ground [385] denies that plaintiff paid out items totaling \$85,172.63 or any other sum, and on the same ground denies each and every other allegation in said Paragraph XV contained.

## XIV.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XVI of said complaint.

## XV.

Answering Paragraph XVII of said complaint, this defendant denies that it was at all times or at any time promptly notified by registered mail or otherwise, of acts or omissions of Duque & Frazzini as alleged in said Paragraph XVII or otherwise. This defendant admits that at some time subsequent to June 11th, 1945, the exact date whereof is unknown to this defendant, it received a letter dated June 11th, 1945, from plaintiff, and admits that it took no action to perform any work alleged to have been abandoned by Duque & Frazzini. This defendant has no knowledge or information sufficient to form a belief as to the truth of the

other allegations in said Paragraph XVII, and on that ground denies all of said allegations not hereinbefore in this paragraph admitted or denied, and on the same ground denies that plaintiff expended the sum or sums mentioned in said Paragraph XVII or any other sum or amount whatever.

#### XVI.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XVIII of said complaint, and on that ground denies each and every allegation therein, and on the same ground denies that there is due plaintiff \$42,047.30 or any other sum or amount.

#### XVII.

This defendant denies that there is now due or owing or [386] unpaid from this defendant to plaintiff the sum of \$78,503.71 or any other sum or amount whatever, as alleged in Paragraph XIX of said complaint or otherwise.

#### XVIII.

Answering Paragraph XX of said complaint, this defendant denies that plaintiff has done or performed, fully or otherwise, each or every or any act on its part to be performed under the terms of the said subcontract bond, a copy of which is attached to plaintiff's complaint as Exhibit "B", and says that plaintiff failed, among other things, to comply with the conditions precedent to any right of recovery by the plaintiff on said subcontract bond, in that:

Plaintiff failed to deliver to this defendant notice of default on the part of said subcontractor as required by the terms of said subcontract bond;

Plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed, contrary to the following express conditions precedent contained in said subcontract bond "that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract";

Plaintiff failed to faithfully or otherwise perform all of the terms, covenants or conditions of said alleged subcontract on the part of plaintiff to be performed;

Plaintiff failed to retain the last payment payable by the terms of said alleged subcontract, without the consent of this defendant thereto in writing or otherwise;

Plaintiff failed to retain all or any reserves or deferred payments retainable by the plaintiff under the terms of said alleged subcontract, without the consent of this defendant [387] thereto in writing or otherwise.

## XIX.

Answering Paragraph XXI of said complaint, this defendant denies that by reason of any failure of this defendant to do any act or thing, whether as alleged in said complaint or otherwise, the plaintiff has suffered any loss whatever, either in the

total sum of \$78,503.71 or any other sum or amount. This defendant admits that plaintiff has demanded of it payment of said sum, but denies that any sum or amount or thing whatever is due or owing or unpaid to the plaintiff from this defendant. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations in said Paragraph XXI not herein in this paragraph admitted or denied.

First Affirmative Defense

For its first affirmative defense, this defendant alleges:

I.

That the complaint herein fails to state a claim against this defendant upon which relief can be granted.

Second Affirmative Defense

For its second affirmative defense, this defendant alleges:

I.

That all obligations of this defendant under the terms of said subcontract bond on which recovery is sought by the plaintiff in this action, a copy of which is attached to said complaint as Exhibit "B", are by the terms of said bond expressly conditioned that if the principal shall perform faithfully the work contracted to be performed under the terms of said alleged subcontract referred to in said bond,

then the obligations of said bond shall [388] be void, otherwise to remain in full force and effect, subject, however, among others, to the following provisions:

“Provided, however, as to said Obligee, and upon the Express Conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon by said Obligee:

First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by Registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owners, or his representative, or the architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the Principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

Second: That the Obligee shall faithfully perform all of the terms, covenants and condi-



tions of such contract on the part of the Obligee to be performed; and shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all [389] such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.”

That by the language of said subcontract bond, the plaintiff in this action is designated as “the Obligee” or “the owner” and this defendant as “the Surety.”

That after the execution of said subcontract bond, and on or about the 7th day of March, 1945, at the special instance and request of the plaintiff, this defendant addressed a letter to the plaintiff in words and figures as follows:

“Glens Falls Indemnity Company  
of Glens Falls, New York

Los Angeles 13, California

March 7th, 1945

RE: Duque & Frazzini to Basich Bros.  
Construction Co. Contract bond

Basich Bros. Construction Co.

600 So. Fremont Ave.

Alhambra, Calif.

Gentlemen:

It is hereby understood and agreed that the 10 days appearing in paragraph ‘First’ is changed to read ‘twenty (20) days.’

GLENS FALLS

INDEMNITY COMPANY

[Seal] By MARWIN F. JONAS,  
Attorney”

II.

That plaintiff failed to comply with the aforesaid conditions precedent, and in particular with the following condition, among others, to wit:

“That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by Registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the architect, if any, shall learn of such default; \* \* \*.”

That after the execution of said subcontract bond, and on or about the 7th day of March, 1945, at the special instance and request of the plaintiff, this defendant addressed a letter to the plaintiff which reads, in part, as follows:

“It is hereby understood and agreed that the 10 days appearing in paragraph ‘First’ is changed to read ‘twenty (20) days.’ ”

### III.

That in and by the terms of plaintiff’s alleged subcontract with defendants Duque & Frazzini, it was provided that the said subcontractor should be required to produce sixteen hundred (1600) cubic yards of material per day; that said subcontractor should be required to start production of materials not later than the 19th day of February, 1945, and to furnish sixteen hundred (1600) cubic yards per day thereafter until completion, and that time should be of the essence in the performance of said alleged subcontract, all of which are more fully alleged in Paragraph IX of plaintiff’s complaint herein.

### IV.

That this defendant is informed and believes and upon that ground alleges that said subcontractor defaulted in the performance of its alleged subcontract on and during every day from the 19th day of February, 1945, until on and after the 8th day of June, 1945. That said default or defaults on the part of the said subcontractor were known to or came to the knowledge of the plaintiff, designated

in said bond as Obligee or owner, or its representative, during every day of said period from February 19th, 1945, until on [391] and after the 8th day of June, 1945. That this defendant did not at any time during the said period nor does it now have any knowledge of either the nature or extent of the aforesaid default or defaults, except that this defendant is informed and believes and upon that ground alleges that said subcontractor failed during each and every day of said period to produce as much as sixteen hundred (1600) cubic yards of material, and that said subcontractor failed to start production of material on or before the 19th day of February, 1945. That the plaintiff had full knowledge of all the facts herein alleged at the time said default or defaults occurred.

#### V.

That plaintiff did not nor did anyone else deliver to this defendant, and this defendant did not receive notice of any default or defaults on the part of the principal as required by the terms of said subcontract bond. This defendant admits that some time subsequent to the 5th day of April, 1945, the exact date whereof this defendant does not know, it received a copy of letter dated April 5, 1945, addressed to Duque & Frazzini, Tonopah, Nevada, a copy of which is hereto attached marked Exhibit "1."

#### Third Affirmative Defense

For its third affirmative defense, this defendant alleges:

## I.

This defendant incorporates by reference herein all the allegations contained in Paragraph I of its second affirmative defense hereinbefore set forth.

## II.

That plaintiff failed to comply with the aforesaid conditions precedent, and in particular with the following conditions, among others, to wit: [392]

“\* \* \* that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; \* \* \*.”

## III.

That this defendant is informed and believes and upon such information and belief alleges that on or prior to the 8th day of June, 1945, the subcontractor abandoned the work under the said alleged subcontract or was compelled by the plaintiff to cease operations thereunder, and that plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed.

## Fourth Affirmative Defense

For its fourth affirmative defense, this defendant alleges:

## I.

This defendant incorporates by reference herein all the allegations contained in Paragraph I of the second affirmative defense hereinbefore set forth.

## II.

That plaintiff failed to comply with the aforesaid conditions precedent, and in particular, with the following condition, among others, to wit:

“That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed. \* \* \*.”

## III.

That this defendant is informed and believes and on that ground alleges that during the period from the 11th day of [393] February, 1945, until on and after the 8th day of June, 1945, the plaintiff violated the terms of said alleged subcontract, and particularly Article XVI thereof, in that said plaintiffs paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of ninety per cent of engineers estimate and ninety per cent of useable materials in stockpile.

## IV.

That this defendant is informed and believes and upon that ground alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the plaintiff violated the terms of said alleged subcontract, and particularly Article XI thereof, in that said plaintiff paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant

does not know, in excess of moneys due the subcontractor under the alleged subcontract.

### V.

That this defendant is informed and believes and upon such information and belief alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the plaintiff furnished its own employees to do the subcontract work, furnished equipment for the performance of the subcontract work, carried all of the men who performed the subcontract work on its own payroll, named itself as employer of the men who performed the subcontract work in all Income Tax Withholding, Social Security and Unemployment Insurance returns and Workmen's Compensation Policies, carried in its own name as assured, Public Liability and Property Damage Insurance on the work being performed under said alleged subcontract, countermanded orders of the subcontractor to the men performing the subcontract [394] work, supervised and directed the production of material, and assumed and took over from the subcontractor the control and supervision of the subcontract work.

### Fifth Affirmative Defense

For its fifth affirmative defense, this defendant alleges:

### I.

This defendant incorporates by reference herein all the allegations contained in Paragraph I of the second affirmative defense hereinbefore set forth.

## II.

That plaintiff failed to comply with the aforesaid conditions precedent, and in particular with the following condition, among others, to wit:

“That the obligee \* \* \* shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, \* \* \* unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.”

## III.

That this defendant is informed and believes and upon that ground alleges that plaintiff failed to retain said last payment payable by the terms of said subcontract, as required by said subcontract bond, or at all, but on the contrary paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys due the subcontractor under the alleged subcontract, which said payment or [395] payments included the last payment payable by the terms of said alleged subcontract.

## IV.

That this defendant is informed and believes and upon such information and belief alleges that plaintiff failed to retain all or any reserves or deferred payments retainable by plaintiff under the terms of



said alleged subcontract, as required by said subcontract bond, or at all, but on the contrary paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys due the subcontractor under the terms of said alleged subcontract, which said payment or payments included all reserves and deferred payments retainable by the plaintiff under the terms of said alleged subcontract.

V.

That the payment of said last payment and all of said reserves and deferred payments were made without the consent of this defendant thereto in writing or otherwise.

Sixth Affirmative Defense

For its sixth affirmative defense, this defendant alleges:

I.

That this defendant is informed and believes and upon that ground alleges that at the time of the execution, delivery and acceptance of said subcontract bond, the subcontractor was in default under the terms of said alleged subcontract in that, among other things said subcontractor was indebted to the plaintiff for large sums of money, the exact amount of which this defendant does not know, paid by plaintiff to or for the account of said subcontractor, on account of the subcontract work, prior to the time when any moneys were due the subcontractor

under the terms of said alleged subcontract; and said subcontractor did not commence [396] producing material under the terms of said alleged subcontract on or before the 19th day of February, 1945. That the plaintiff had reason to believe that such facts were unknown to this defendant; that the plaintiff had a reasonable opportunity to communicate such facts to this defendant; that the plaintiff failed to communicate such facts to this defendant, but on the contrary concealed such facts from this defendant by suppressing plaintiff's knowledge of the same and by failing to inform this defendant that said subcontractor was then in default in the performance of said subcontract work, with the intent to induce this defendant to execute said subcontract bond.

## II.

That this defendant was wholly deceived by plaintiff's said concealment of said facts, and was thereby induced to make, execute and deliver the said subcontract bond, to this defendant's damage. That this defendant would not have made, or executed or delivered said subcontract bond if this defendant had known or had any cause whatever to believe that said subcontractor was then in default under the terms of said alleged subcontract.

### Seventh Affirmative Defense

For its seventh affirmative defense, this defendant alleges:

## I.

That this defendant is informed and believes and upon that ground alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the said alleged subcontract was materially altered by the plaintiff, acting in agreement with the subcontractor, or with the consent and acquiescence of the subcontractor, and without the knowledge or consent of this defendant by the substitution of a new executed oral contract, which oral contract altered the said alleged subcontract [397] in the particulars, among others, as hereinafter in this affirmative defense alleged.

## II.

That Paragraph XVI of said alleged subcontract was altered to permit the payment by plaintiff and plaintiff did pay to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of ninety per cent of engineers estimate and ninety per cent of useable materials in stockpile.

## III.

That Article XI of said alleged subcontract was altered to permit the payment by plaintiff and plaintiff did pay to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys due the subcontractor under the alleged subcontract.

## IV.

That said alleged subcontract was altered to permit plaintiff to and plaintiff did supervise and direct the production of materials and did take over and control and supervise the said subcontract work.

## Eighth Affirmative Defense

For its eighth affirmative defense, this defendant alleges:

## I.

That this defendant is informed and believes and upon that ground alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the plaintiff prematurely paid to or for the account of the said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, [398] as hereinafter in this affirmative defense alleged.

## II.

That during the period from the 11th day of February, 1945, until the date when said subcontractor produced the first materials under said alleged subcontract, which date is unknown to this defendant but which date this defendant is informed and believes and on that ground alleges was subsequent to the 19th day of February, 1945, plaintiff paid to or for the account of the subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant

does not know which payments were made prior to the date when any moneys were due to the subcontractor on account of the subcontract work.

### III.

That during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, plaintiff paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys then due the subcontractor on account of the subcontract work.

### IV.

That during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, plaintiff paid to or for the account of the subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of the total subcontract price.

### V.

That each and all of said payments were made without the knowledge, acquiescence or consent of this defendant. [399]

## Ninth Affirmative Defense

For its ninth affirmative defense, this defendant alleges:

### I.

That this defendant is informed and believes and upon that ground alleges that on or about the 8th

day of June, 1945, the subcontractor abandoned the work under said alleged subcontract, or was compelled by the plaintiff to cease operations thereunder, and that plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed.

## II.

That plaintiff by so taking possession and control of and proceeding with said work, elected to and did wholly waive its right to recover on said subcontract bond.

## III.

That this defendant relied upon the aforesaid waiver and election of plaintiff, and so relying this defendant made no attempt whatever to exercise its right to proceed or procure others to proceed with the performance of said alleged subcontract as provided by the terms of said bond, and particularly the provisions of Paragraph "First" thereof.

Wherefore, this defendant prays that the plaintiff take nothing by its complaint; that this defendant be awarded judgment for its costs herein incurred and for such other and further relief as may appear equitable and proper.

/s/ JOHN E. McCALL,  
Attorney for Defendant Glens Falls Indemnity  
Company, a corporation. [400]

State of California,  
County of Los Angeles—ss.

John E. McCall, being sworn, says: That he is an Attorney at Law admitted to practice before all courts of the State of California, and has his office in Los Angeles, Los Angeles County, State of California, and is the attorney for defendant Glens Falls Indemnity Company, a corporation in the above-entitled action; that said defendant is unable to make this verification because it has no officer within Los Angeles County, and for that reason affiant makes this verification on said defendant's behalf; that he has read the foregoing First Amended Answer of Defendant Glens Falls Indemnity Company, a Corporation, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ JOHN E. McCALL.

Subscribed and sworn to before me this 28th day of August, 1946.

[Seal] /s/ FRANK M. BEVERLY,  
Notary Public in and for the County of Los Angeles, State of California. [401]

## EXHIBIT No. 1

Basich Brothers Construction Co.

Registered Mail

April 5, 1945

Duque and Frazzini,  
P. O. Box 73,  
Tonopah, Nevada.

Gentlemen:

Reference is made to our Contract Agreement, dated February 7, 1945, in which you agreed to commence crushing material with one plant on February 19, 1945. It was further agreed that you were to move in two plants, each capable of producing 800 cubic yards per day of suitable material. Your attention is directed to the fact that the plant did not commence work on February 19th; furthermore, to date you have not averaged 800 cubic yards of material per plant per day.

Since we reserve the right to compel you to move in additional equipment to insure proper completion of your contract, we hereby demand that you move in additional and suitable equipment in order to produce the amount agreed upon in our contract.

Our entire concrete paving operation is dependent on your production and you are reminded that your Company is now using our tools and equip-



ment, since you do not have suitable equipment of your own on the job.

Very truly yours,

BASICH BROTHERS CON-  
STRUCTION CO.,

By /s/ N. L. BASICH.

cc: Duque & Frazzini, Tucson, Ariz.

cc: Glens Falls Indemnity Co.,

Los Angeles, California.

GJP/dc

EXHIBIT No. 2

Law Offices

Stephen Monteleone

Petroleum Building

713 West Olympic Boulevard

Los Angeles 15

April 27, 1945

To Duque & Frazzini

P. O. Box 73

Tonopah, Nevada,

and

Glens Falls Indemnity Company

Of Glens Falls, New York,

801 Fidelity Building,

548 South Spring Street

Los Angeles 13, California

You and each of you are hereby notified that:

Whereas, on February 7, 1945, Basich Brothers

Construction Company, as first party, entered into a written contract with said Duque & Frazzini as second parties by the terms of which said contract said second parties, as subcontractors, agreed to perform certain of the requirements therein specifically stated in connection with the contract between first party as the Prime Contractor and the United States of America for the construction of Taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tuscon, Arizona, Contract No. W-04-353-Eng.-1302;

Whereas, in said contract between said first party and said second parties of date February 7, 1945, it is provided, among other things, that if said second parties, as such subcontractors, shall fail to prosecute said work continuously with sufficient workmen and equipment to insure its [403] completion, first party, within five days will reserve the right to compel said subcontractors to move in another plant;

Whereas, said second parties, as such subcontractors, agreed to erect two plants, each to produce 800 cubic yards of suitable material a day to be used in connection with said Government Contract;

Whereas, said second parties agreed, in said contract of date February 7, 1945, to commence their work not later than February 19, 1945, and shall complete the same on or before June 3, 1945;

Whereas, it is therein further provided that time is of the essence of said contract;

Whereas, said second parties have failed to com-

ply with the obligations imposed on them in said contract of date, February 7, 1945, in that, among other things, they have failed to prosecute said work continuously with sufficient workmen and equipment as therein required; and further, they have failed to produce 800 cubic yards of suitable material a day from each of said two plants but instead have produced less than fifty per cent thereof;

Whereas, on April 5, 1945, said Basich Brothers Construction Company notified said Duque & Frazzini and its surety, said Glens Falls Indemnity Company, of the aforesaid failure to comply with said contract of date February 7, 1945, and demanded that additional and suitable equipment be moved on the job to produce the amount of material as in said agreement provided, all of which both said second parties and their said surety company failed to do;

Now, therefore, you, the said Duque & Frazzini, as principals, and said Glens Falls Indemnity Company as the surety of said principals, are, and each of you are, hereby notified that said Basich Brothers Construction Company will hold you and each of you responsible for all direct and consequential [404] damages sustained by them by reason by said failure to comply with said contract and any future damages, both direct and consequential, which may result by your continued failure to comply with the above requirements of said contract;

You, and each of you are hereby notified that said Basich Brothers Construction Company will exercise all reasonable efforts to minimize said damages

and will endeavor to, and if possible, will install additional and independent means to produce the required material without in any manner waiving its claims or any rights against you and each of you or in any manner releasing you of any of your obligations, past, present and future, under said contract of date February 7, 1945.

Dated: April 27, 1945.

BASICH BROTHERS CON-  
STRUCTION COMPANY,  
By STEPHEN MONTELEONE,  
Its Attorney.

SM/gr

[Endorsed]: Filed Sept. 9, 1946. [405]

---

[Title of District Court and Cause.]

#### AMENDMENTS TO BILL OF PARTICULARS

To the Honorable, the District Court of the United States, Southern District of California, Central Division:

Plaintiff, Basich Brothers Construction Company, a corporation, herewith presents amendments to its Bill of Particulars on file herein as applied to Schedule VI (Insurance) of said Bill of Particulars by specifying each classification of insurance separately and the amount of premium paid thereon in connection with the subcontract of Duque & Frazzini, a co-partnership, referred to in Plaintiff's complaint as follows: [406]

Insurance Breakdown

Date	Comp.	P.L.& P.D.	A.U.R.C.	F.O.A. & Excise	Total
2/17/45	26.39	10.29	15.26	7.35	59.29
2/24/45	80.66	27.03	46.63	22.45	176.77
3/ 3/45	82.81	29.40	47.88	23.05	183.14
3/10/45	62.54	25.36	36.16	17.41	141.47
3/17/45	65.56	29.39	37.90	18.25	151.10
3/24/45	91.38	35.65	52.83	25.44	205.30
3/31/45	130.02	40.37	67.88	32.68	270.95
4/ 7/45	175.04	47.67	84.59	40.73	348.03
4/14/45	209.87	55.90	99.86	48.08	413.71
4/21/45	176.21	44.23	84.60	40.73	345.77
4/28/45	170.92	41.12	81.21	39.10	332.35
5/ 5/45	347.54	17.79	121.57	58.54	545.44
5/12/45	349.49	18.27	122.70	59.09	549.55
5/19/45	280.99	14.71	96.65	46.54	438.89
5/26/45	261.77	12.61	95.29	45.88	415.55
6/ 2/45	266.06	13.13	96.24	46.35	421.78
6/ 9/45	267.38	13.34	94.97	45.71	421.40
6/16/45	207.88	20.81	72.42	34.87	335.98
6/23/45	210.22	22.44	73.56	35.42	341.64
6/30/45	197.96	19.52	68.60	33.03	319.11
7/ 7/45	171.05	9.99	54.41	26.20	261.65
7/14/45	120.95	4.94	38.15	18.37	182.41
7/21/45	122.35	5.11	38.59	18.58	184.63
7/28/45	108.01	9.68	36.66	17.65	172.00
8/ 4/45	102.31	15.59	38.93	18.75	175.58
8/11/45	82.09	4.14	25.89	12.47	124.59
8/18/45	4.79	2.27	2.77	1.33	11.16
8/25/45	86.84	6.36	28.70	13.82	135.72
9/ 1/45	70.98	5.95	23.92	11.51	112.36
9/ 8/45	51.81	5.00	18.01	8.67	83.49
9/15/45	16.08	1.06	5.07	2.44	24.65
9/22/45	37.14	1.97	11.72	5.64	56.47
	<hr/> 4,635.09	<hr/> 611.09	<hr/> 1,819.62	<hr/> 876.13	<hr/> 7,941.93
	1,258.51*				1,258.51*
Totals	<hr/> 5,893.60	<hr/> 611.09	<hr/> 1,819.62	<hr/> 876.13	<hr/> 9,200.44

\*Differential in 5506 and 1710 Rate in comp. insurance.

## Explanation:

The above constitutes Insurance Breakdown on the Duque and Frazzini Subcontract.

Comp. refer to Compensation Insurance.

P.L.& P.D. refers to Public Liability and Property Damage.

A.U.R.C. refers to Arizona Unemployment Reserve Commission.

F.O.A. refers to Federal Old Age and Excise Tax.

State of California,  
County of Los Angeles—ss.

Homer Thompson, being first duly sworn, deposes and says: That he is an auditor employed by Basich Brothers Construction Company and was in charge of the auditing of the accounts for said plaintiff in connection with the construction of the Government Project at Tucson, Arizona, referred to in Plaintiff's Complaint on file herein; that the herein amendment to Schedule VI of Plaintiff's Bill of Particulars on file herein contains an itemized statement of insurance paid by plaintiff for its subcontractors, Duque & Frazzini, the same being segregated into the different classification of insurance as in said amendment specified and the amounts paid on account thereof and the same is true of his own knowledge.

/s/ HOMER THOMPSON.

Subscribed and sworn to before me this 14th day of November, 1946.

[Seal]                      GEORGE J. POPOVICH,  
Notary Public in and for said County of Los Angeles, State of California.

My commission expires Aug. 18, 1947. [409]

[Title of District Court and Cause.]

Received copy of the within Amendment to Bill of Particulars this 15th day of November, 1946.

J. E. McCALL,  
By JOSEPH J. BURRIS,  
Attorney for Deft. Glens  
Falls I. Co.

[Endorsed]: Filed Nov. 15, 1946. [410]

---

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the plaintiff and the defendant Glens Falls Indemnity Company, a corporation, represented by their respective attorneys of record:

1. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all withholding returns and withholding receipts which were filed with the Internal Revenue Department covering employees working on the alleged subcontract work of Duque & Frazzini;

2. That Basich Brothers Construction Company, a corporation, [411] plaintiff herein, is named as employer in all Arizona State Employment Insurance returns covering employees working on the alleged subcontract work of Duque & Frazzini;

3. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Social Security returns made under

the Federal Insurance Contributions Act, covering employees working on the alleged subcontract work of Duque & Frazzini;

4. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as insured in all policies of insurance covering public liability and property damage on the alleged subcontract work of Duque & Frazzini;

5. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Workmen's Compension Insurance policies covering employees working on the alleged subcontract work of Duque & Frazzini;

6. That all wages and salaries of all employees performing labor or services on the alleged subcontract between the plaintiff herein and Duque & Frazzini, dated February 7, 1945, were paid by the plaintiff Basich Brothers Construction Company, a corporation.

Dated July 1, 1946.

.....

Attorney for Plaintiff.

JOHN E. McCALL,

Attorney for Defendant Glens  
Falls Indemnity Company,  
a Corporation.

[Endorsed]: Filed Oct. 14, 1946. [412]



[Letterhead John E. McCall]

October 8, 1946

Mr. Stephen Monteleone  
Attorney at Law  
1050 Petroleum Building  
714 West Olympic Boulevard  
Los Angeles, California

Dear Mr. Monteleone:

Re: Basich Brothers Construction  
Company vs. Glens Falls Indemnity  
Company  
Our File No. 2025A

You suggested that I point out the items in your Bill of Particulars to which we object. I am listing a few specific entries from the various schedules, but if you will refer to the records which your client exhibited to Mr. Vernon you will see that similar items are too numerous to set out in a letter.

(1) Time cards, weekly payroll sheets, and Basich Brothers Construction Company weekly payrolls do not indicate that the men working on the alleged subcontract job are employees of Duque & Frazzini: (Schedule I, II, III, IV and V.)

(2) These same records do not indicate that the men who were mentioned in the Bill of Particulars performed work on the alleged subcontract job: (Schedules I, II, III, IV and V).

(3) Pay checks of men claimed to have been working on the alleged subcontract job do not show

that the employees mentioned in the Bill of Particulars were employees of Duque & Frazzini: (Schedules I, II, III, IV and V). [413]

(4) Numerous improper charges have been made in the Bill of Particulars, such as:

(A) Schedule X lists one R. U. Carryall which is charged as fully operated (including operator). Schedule I charges the wages of L. E. McDaniel and Rex McCoy, the operators of the equipment, for the same period.

(B) Schedule X lists Dozer 428 as a 12½ hour charge. The blue equipment card for Dozer lists 10½ hours.

(C) Many time cards list impossible working hours. For example, Jack L. Brown, April 17, 1945, is credited with 25½ working hours, 8 hours straight time and 17½ hours overtime is a part of Schedule I.

(D) Clarence Hampton is credited with 21 hours on March 2, 1945, with only 30 minutes deducted for eating time: (Schedule I).

(E) Schedule XXIV charges three months for bins but shows they were used 7 days less than three months.

(F) Schedule XXI charges Duque & Frazzini with 179.5 truck hours on June 30, 1945. Records examined show only 99 truck hours on this date.

(G) Many of the employees listed in Schedule I of the Bill of Particulars received rates of pay which were higher than the work

classifications [414] which they performed: S. A. Moreno, a laborer, received the scale of an air tool operator; Victor Oasquez, a laborer, received the scale of a dumpman.

(H) Schedule XVII charges Duque & Frazzini a royalty on production of 2,223 tons of sand for which they receive no payment under the production credits.

If I am in error regarding any of the points mentioned, please advise me.

Yours very truly,

J. E. McCALL.

PEMcC:mc

[Endorsed]: Filed Oct. 14, 1946. [415]

---

Basich Brothers Construction Co.

Daily Home Office Report

(4) A. This charge for wages of McDaniel & McCoy is incorrect. Credit \$39.75.

B. Charge should be 10½ instead of 12½. Credit 20.40.

C. These hours on Jack L. Brown were submitted to us on D & F Payroll of which we have a copy of the original. We never questioned hours worked on any of Duque & Frazzini men whose time was turned in by A. Duque on their own payroll.

D. According to our records Clarence Hampton worked only 11 hrs. on March 2, 1945. This is all we claim.

E. Credit \$15.00 for overcharge of 7 days rental of 2 bins.

F. 179½ hrs. is in error. 99 hrs. are correct. Credit 332.47.

G. Due to the labor shortage, it was necessary for us to make certain concessions in order to keep the men.

H. I believe sand was included with Mineral Aggr.

[Endorsed]: Filed Oct. 14, 1946. [416]

---

[Title of District Court and Cause.]

### AMENDMENTS TO PLAINTIFF'S COMPLAINT

Comes now the plaintiff herein and, leave of Court being first had and obtained, files these amendments to its complaint on file herein, designated as Paragraphs XXII, XXIII, XXIV, XXV, XXVI and XXVII respectively, and complains and alleges:

#### XXII.

That following the execution of the alleged sub-contract between plaintiff and Duque & Frazzini a copy of which is attached to plaintiff's complaint and marked Exhibit "A," said Duque & Frazzini advised plaintiff that their available cash was tied up in prior work they had completed, and were unable to meet the payroll and supplies necessary in installing and operating their plant for the per-

formance of the requirements on their part under said contract and requested plaintiff to make said payments as in said contract provided; that by reason of the above situation and in compliance with the provisions of said Exhibit "A," plaintiff made payments of labor, supply and material claims incurred by said Duque & Frazzini in the performance of said Exhibit "A" as therein provided; that at no time mentioned in plaintiff's complaint or at all did plaintiff make any payment direct to said Duque & Frazzini in the performance by them of the requirements of said Exhibit "A," or made any of said payments in any other manner except for and on account of said labor, supply and material claims, as aforesaid; that during all of said times, while plaintiff was making said payments, as aforesaid, defendant, Glens Falls Indemnity Company, was fully advised thereof; that it had, in addition thereto, investigated through its duly authorized representatives, the records of said Duque & Frazzini and of said payments and amounts earned by said Duque & Frazzini up to the date of said investigation and the manner under which all of said payments, including payments of premium and other charges on insurance required of said Duque & Frazzini under said Exhibit "A" were being made by plaintiff and thereupon charged against said Duque & Frazzini.

## XXIII.

That on or about May 24, 1945, plaintiff notified said defendant in writing that said Duque & Frazzini were not paying the said labor claims and that it, said plaintiff, had previous thereto, made said labor payments, material payments and supply payments incurred by said Duque & Frazzini in the prosecution of said Exhibit "A" but that the amount of money earned by them thereunder was not sufficient to meet the past advancements made by it and said defendant and said Duque & Frazzini were therein notified to make payment of all present and future labor claims of said Duque & Frazzini in the performance of said Exhibit "A". That said [418] defendant, in reply to said demand of plaintiff, notified plaintiff in writing through its duly authorized agent, on or about June 7, 1945, that plaintiff was required to make said payments pursuant to the provisions of said Exhibit "A".

## XXIV.

That at no time referred in said complaint, did said defendant, after being fully advised, as aforesaid, notify plaintiff that it, plaintiff had no right to make said payments or that the making of any such payments in excess of the amount earned by said Duque & Frazzini were in violation of any of the provisions of said Exhibit "A" or the provisions and conditions of the bond executed by said defendant referred to in said complaint, nor did it, at any of said time, or at all, advise plaintiff that it would disavow its liability under said bond.

## XXV.

That on or about April 5, 1945, said defendant was notified by plaintiff that said Duque & Frazzini were not meeting the quantity of material required by them under said Exhibit "A" and that additional and suitable equipment be installed as required under said Exhibit "A"; that thereafter and on or about April 27, 1945, said defendant was again notified that said Duque & Frazzini had failed to prosecute the work as required under said Exhibit "A" or provide sufficient men and equipment as therein required and if said Duque & Frazzini and said defendant failed to comply with said demands, plaintiff would adopt independent means to meet said requirements; that although said defendant was so notified and thereafter further notified of the aforesaid situation, it failed to make any provisions to remedy said situation nor did it at any time mentioned in plaintiff's complaint or at all advise plaintiff that it desired, under its said bond, to provide the means of fulfilling the requirements of said Exhibit "A" on the part of said Duque & Frazzini. [419]

## XXVI.

That, by reason of the conduct and acts of said defendants, as aforesaid, it waived any rights which it may have had for any alleged failure on the part of plaintiff to comply with any of the provisions of said bond or for any alleged changes in the terms of said Exhibit "A".

## XXVII.

That by reason of the conduct and acts of said defendant, as aforesaid, it is estopped from assert-

ing any rights which it may have had for any alleged failure on the part of plaintiff to comply with any of the provisions of said bond or for any alleged changes in the terms of said Exhibit "A".

Wherefore, plaintiff prays judgment as in its said complaint specified.

STEPHEN MONTELEONE and  
TRACY J. PRIEST,

By /s/ STEPHEN MONTELEONE,  
Attorneys for Plaintiff. [420]

State of California,  
County of Los Angeles—ss.

N. L. Basich, being first duly sworn, deposes and says: That he is the President of plaintiff, Basich Brothers Construction Company, a corporation; that he has read the foregoing Amendments to Plaintiff's Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters stated on information and belief and, as to those matters he believes the same to be true.

/s/ N. L. BASICH.

Subscribed and sworn to before me this 27th day of December, 1946.

/s/ KAY TROMBLEY,

Notary Public in and for said County of Los Angeles, State of California.

My commission expires Feb. 13, 1950.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 5, 1947.



[Title of District Court and Cause.]

ANSWER OF DEFENDANT GLENS FALLS  
INDEMNITY COMPANY, A CORPORA-  
TION, TO PLAINTIFF'S COMPLAINT AS  
AMENDED.

Comes now Glens Falls Indemnity Company, a corporation, one of the defendants in the above-entitled action, and answering plaintiff's complaint as amended, on file herein, for itself and no other defendant, admits, denies and alleges as follows:

I.

This defendant reiterates and adopts all of the admissions, denials and allegations contained in its first amended answer herein. [423]

II.

Answering the allegations in Paragraph XXII of the complaint as amended, this defendant admits that plaintiff made certain payments on account of labor and supplies and materials used in the performance of the alleged subcontract work, but denies that said payments or any of them were made in compliance with the provisions of said Exhibit "A", and further denies that during all or any of said times this defendant was fully or at all advised thereof, and denies that this defendant learned through investigation or otherwise of said alleged payments, or of the amounts earned by Duque & Frazzini up to the date of said alleged investigation or at all, or the manner under which said alleged payments or any of them were made,

or in what manner, if any, said payments were charged against Duque & Frazzini. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of said Paragraph XXII not herein in this paragraph admitted or denied.

### III.

Answering Paragraph XXIII of the complaint as amended, this defendant admits that some time subsequent to the 24th day of May, 1945, the exact date whereof this defendant does not know, it received a letter dated May 24th, 1945, addressed to Duque & Frazzini and Glens Falls Indemnity Company of Glens Falls, New York, but denies that said letter contained any language other than that expressly set forth in the letter itself, a copy of which is attached hereto, marked Exhibit "3" and by this reference made a part hereof. This defendant admits that on or about the 7th day of June, 1945, through its attorney John E. McCall, it addressed a letter to plaintiff herein, in care of Stephen Monteleone, plaintiff's attorney, but this defendant denies that said letter notified plaintiff that it, plaintiff herein, was required to make said or any payments pursuant to the provisions of said Exhibit "A", and denies that said letter contained any language other than that expressly set forth in the [424] letter itself, a copy of which is attached hereto, marked Exhibit "4" and by this reference made a part hereof.

## IV.

Answering Paragraph XXIV of the complaint as amended, this defendant denies that it was ever fully or at all advised as alleged by plaintiff in Paragraph XXIII of said complaint as amended, and denies that this defendant did not at any time, as alleged in said Paragraph XXIV, notify plaintiff that plaintiff had no right to make said or any payments, but alleges that on or about the 7th day of June, 1945, this defendant notified plaintiff, in a letter addressed to plaintiff in care of its attorney Stephen Monteleone, a copy of which said letter is hereunto attached marked Exhibit "4," that plaintiff had no right to charge anything to this defendant as Surety, inasmuch as the Surety had no liability whatever except such liability as might exist under the express terms of its bond. This defendant further alleges that on or about the 23rd day of June, 1945, in a letter addressed to plaintiff herein in care of its said attorney Stephen Monteleone, this defendant notified plaintiff that this defendant would not recognize any claim which was not expressly covered by the terms of its contract bond. That a copy of said letter of June 23rd, 1945, is attached hereto marked Exhibit "5" and by this reference made a part hereof.

## V.

Answering Paragraph XXV of the complaint as amended, this defendant admits that some time subsequent to the 5th day of April, 1945, the exact date whereof this defendant does not know, it received a copy of letter dated April 5, 1945, addressed to

Duque & Frazzini, Tonopah, Nevada, a copy of which is attached to this defendant's first amended answer herein as Exhibit "1", and admits that some time subsequent to the 27th day of April, 1945, the exact date whereof this defendant does not know, it received a letter from plaintiff, by and through plaintiff's attorney Stephen Monteleone, [425] dated April 27th, 1945, a copy of which is attached to this defendant's first amended answer herein as Exhibit "2", but this defendant denies that said letters or either of them contained any language other than that expressly set forth in the said letters themselves.

#### VI.

Answering Paragraph XXVI of the complaint as amended, this defendant denies that it waived any right or rights which it had or now has under the terms and provisions of said subcontract bond or said subcontract as alleged in said Paragraph XXVI or at all.

#### XII.

Answering Paragraph XXVII of the complaint as amended, this defendant denies that it is estopped from asserting any right or rights which it had or now has by reason of the failure on the part of the plaintiff to comply with any of the provisions of said subcontract bond, or because of any alterations or changes in the terms of said subcontract referred to by plaintiff as Exhibit "A", or for any other reason or at all.

Wherefore, this defendant prays that the plaintiff take nothing by its complaint as amended; that this defendant be awarded judgment for its costs

herein incurred and for such other and further relief as may appear equitable and proper.

/s/ JOHN E. McCALL,

Attorney for Defendant Glens Falls Indemnity Company, a corporation. [426]

State of California,  
County of Los Angeles—ss.

John E. McCall, being sworn, says: That he is an Attorney at Law admitted to practice before all courts of the State of California, and has his office in Los Angeles, Los Angeles County, State of California, and is the attorney for defendant Glens Falls Indemnity Company, a corporation in the above-entitled action; that said defendant is unable to make this verification because it has no officer within Los Angeles County, and for that reason affiant makes this verification on said defendant's behalf; that he has read the foregoing Answer of Defendant Glens Falls Indemnity Company, a Corporation, to Plaintiff's Complaint as Amended, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ JOHN E. McCALL.

Subscribed and sworn to before me this 17th day of January, 1947.

[Seal] /s/ FRANK M. BENEDICT,

Notary Public in and for the County of Los Angeles, State of California. [427]

## EXHIBIT No. 3

[Letterhead Stephen Monteleone]

May 24, 1945

To Duque &amp; Frazzini

P. O. Box 73

Tonopah, Nevada

and

Glens Falls Indemnity Company of

Glens Falls, New York,

801 Fidelity Building

548 South Spring Street

Los Angeles 13, California

Gentlemen:

You and each of you are hereby notified:

That on February 7, 1945, Basich Brothers Construction Company, prime contractor as first party, entered into a written contract with Duque & Frazzini as sub-contractor, second parties, in connection with the construction of taxiways, warm-up and parking aprons, Job. No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng. 1302;

Whereas, pursuant to said contract, Glens Falls Indemnity Company of Glens Falls, New York, executed, as surety, and said Duque & Frazzini as principals, a sub-contract bond in favor of Basich Brothers Construction Company in the sum of \$101,745.55, dated February 20, 1945;

Whereas, Article XI of said contract of date February 7, 1945 requires the sub-contractors to

promptly make payment to all persons supplying them with labor, materials and supplies for the prosecution of the work or in connection therewith and in the event the sub-contractor shall not make such payments, the prime contractor may make said payments and deduct from any moneys due the sub-contractor such advancements.

Whereas, it is provided in the bond of said sub-contractor of date February 20, 1945, that the principal and surety agree to pay all just labor claims arising under said contract within two weeks after demand.

You, and each of you, are hereby notified that said sub-contractors are not paying the just labor claims arising under said contract of date February 7, 1945 and, apparently will encounter difficulty in continuing the payment of said labor claims.

You, and each of you, are hereby notified that pursuant to said Article XI contained in said contract of February 7, 1945, the prime contractor has made labor payments, material payments and supply payments for said sub-contractors in the past for the prosecution of said work but that the amount of moneys due the sub-contractors is not sufficient to meet the past advancements made by the contractor Basich Brothers Construction Company; that such deficiency shall be chargeable against the sub-contractors and the above surety Glens Falls Indemnity Company. As soon as an account can be prepared on this matter, the same will be submitted to you.

will pay, among other things, the weekly payrolls for labor. You further state, on the second page of your said letter of May 24th, that you will pay labor claims and charge same to the Surety and subcontractors. You [431] of course realize that your client has no right to charge anything to the Surety, as the Surety has no liability whatever except such liability as may exist under the express terms of its bond.

Your letter of June 1st stated that you had been informed that Duque & Frazzini shut down their small crusher plant on May 31st. I communicated this information to my client, and I am advised by Mr. Bray that he has received information from the subcontractors that there was a short breakdown of the small plant, but satisfactory production has been restored.

After the receipt of your two letters of May 23rd and 24th, the writer, with Mr. John Bray, made a trip to the job at Tucson, at which time you were present, and we were advised by the subcontractors and by your client at the site of the plants crushing the rock and making the aggregates, that no time has been lost by your client because of under production, but on the contrary, there was enough material then ahead for several days concrete pouring. I am therefore unable to understand why your client wishes to put in additional equipment to take care of extra work when our information received from the subcontractors and from your client is to the effect that there has been no shortage what-



ever of aggregates to date. If this is not correct, please advise in what particular it is not correct, so that I may communicate the information to my client.

Yours very truly,

J. E. McCALL.

JEMcC:mc

cc: 2—Glens Falls Indemnity Company

1—Ralph W. Bilby, Tucson, Arizona [432]

EXHIBIT No. 5

[Letterhead John E. McCall]

June 23, 1945

Basich Brothers Construction Company  
c-o Mr. Stephen Monteleone, Attorney  
714 West Olympic Boulevard  
Los Angeles 15, California

Gentlemen:

Your letter of June 8th, 1945 addressed to Duque & Frazzini and Glens Falls Indemnity Company, and your letters of June 11th and 14th, 1945 addressed to Glens Falls Indemnity Company, have been referred to me for attention and reply on behalf of the Glens Falls Indemnity Company only.

I do not represent the subcontractors Duque & Frazzini and do not know the full extent of their obligations to you, if any, but if you will examine the terms and conditions of the surety bond which

was posted in this case I am sure you will realize that the Glens Falls Indemnity Company is not liable to you for any labor or materials or equipment performed or furnished to said subcontractors or anyone else in connection with the job in question.

Your letter of June 8th states that you have received no co-operation from either the subcontractors or the surety except "promises and assurances." Please advise us what co-operation you think you should have received from the surety, but which you have not received. I am sure you have received no "promises and assurances" other than those expressed in the terms of the surety bond. Said contract bond contains every condition under which you [433] could have a claim or demand against the surety.

You further state that you are securing certain material and performing certain work which you are charging to the principal and surety. We do not know what agreement you may have with the subcontractors, but we are sure that you have no right to perform or furnish anything, or have anything performed or furnished and charge the same to the surety, and the surety will not recognize any claim you may make which is not expressly covered by the terms of its contract bond.

Your letter of April 5th, 1945 and several other letters received since that date state that the subcontractors did not commence work on the subcontract on February 19th, 1945 as required by the terms of their contract, but your letter of June 11th,

1945 states that you do not know when the sub-contractors did commence work on the subcontract in question.

If you have wrongfully taken the contract over, as is indicated by your letters, or if you have failed to give notice required by the terms of the contract bond, or if you have failed in any other respect to perform any of the conditions precedent required of you by the terms of the bond, you can have no valid claim against the surety.

Yours very truly,

J. E. McCALL.

JEMcC:M [434]

Received copy of the within Answer this 20th day of January, 1947.

STEPHEN MONTELEONE and  
TRACY J. PRIEST,  
/s/ STEPHEN MONTELEONE,  
By /s/ GEORGIA RICHARDS,  
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 21, 1947. [435]

[Title of District Court and Cause.]

MEMORANDUM OF DEFENDANT GLENS  
FALLS INDEMNITY COMPANY, A COR-  
PORATION, RE PLAINTIFF'S BILL OF  
PARTICULARS [436]

Plaintiff's Bill of Particulars—Schedule I

Page

1	Jack Brown—Tractor Driver	
	3/17/45 (Sat.) Time Card recorded 8½ hrs. Was paid for 11 hrs. Overpaid 2½ hrs. (Overtime) at \$2.25 per hr.....	\$ 5.63
	3/18/45 (Sun.) Time Card recorded 8 hrs. Was paid for 16½ hrs. Overpaid 8½ hrs. at \$2.25 per hr. ....	19.12
	4/12/45 (Thurs.) Time Card recorded 13 hrs. Was paid for 13½ hrs. Overpaid ½ hr. at \$2.25 per hr.....	1.13
	4/20/45 (Fri.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.50 per hr. ....	3.00
	4/22/45 (Sun.) Time Card recorded 13½ hrs. Was paid for 18½ hrs. Overpaid 5 hrs. at \$2.25 per hr. ....	11.25
	4/23/45 (Mon.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.50 per hr. ....	3.00
	5/6/45 (Sun.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$2.25 per hr. ....	1.12

Page

	4/17/45 (Tues.) Time Card recorded 25½ hrs. Payment was made on the basis of 8 hrs. straight time and 17½ hrs. overtime, amounting to \$51.38. Time Card recorded work from 3:00 p.m. on 4/17/45 to 5:00 p.m. on 4/18/45. Should have been paid for 9 hrs. less ½ hr. lunch period or 8½ hrs. on 4/17/45, and for 17 hrs. less ½ hr. lunch period or 16½ hrs. on 4/18/45, amounting to \$44.25. Overpaid.....\$	7.13
2	Jack L. Brown—Foreman 5/18/45 (Fri.) Time Card recorded 15½ hrs. Was paid for 17½ hrs. Overpaid 2 hrs. (Overtime) at \$2.625 per hr. ....	5.25
3	Sidney Cohen—Truck Driver 3/19/45 (Mon.) Time Card recorded 9 hrs. Was paid for 9½ hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5	Ray Hurler—Tractor Operator 5/30/45 (Wed.) Time Card recorded 11 hrs. Was paid for 12 hrs. Overpaid 1 hr. at \$2.25 per hr. ....	2.25
12	Vaughn P. Allred—Truck Driver 4/27/45 (Fri.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75

## Page

14	Clarence Hampton—Plant Foreman	
	No lunch period of $\frac{1}{2}$ hr. was deducted on the records of this employee on the following 61 days: March 20, 24, 25, 27, 28, 30, 31; April 2, 3, 4, 5, 6, 7, 9, 13, 14, 17, 18, 19, 20, 25, 26, 27, 28, 29, 30; May 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31; June 1, 3, 4, 5, 6, 7, 8. 61 days at $\frac{1}{2}$ hr. equals $30\frac{1}{2}$ hrs. at \$2.625 per hr. ....	\$80.06
19	Frank Mariscal—Laborer	
	5/13/45 (Sun.) Time Card recorded 10 hrs. Was paid for 20 hrs. Overpaid 10 hrs. at \$2.0625 per hr. ....	20.63
	5/18/45 (Fri.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. ....	1.03
	5/27/45 (Sun.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. ....	1.03
	5/28/45 (Mon.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. ....	1.03
	5/30/45 (Wed.) Time Card recorded 9 hrs. Was paid for $9\frac{1}{2}$ hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. ....	1.03
	6/1/45 (Fri.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. ....	1.03

## Page

	6/7/45 (Thurs.) Time Card recorded 10 $\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr.....	\$ 1.03
	6/8/45 (Fri.) Time Card recorded 10 $\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. ....	1.03
23	Don Tomany—Truck Driver	
	3/13/45 (Thurs.) This employee was paid for 4 hrs. more than he worked. Overpaid 4 hrs. at \$1.00 per hr. ....	4.00
	3/24/45 (Sat.) Time Card recorded 10 hrs. Was paid for 15 $\frac{1}{2}$ hrs. Overpaid 5 $\frac{1}{2}$ hrs. at \$1.50 per hr. ....	8.25
	3/31/45 (Sat.) Time Card recorded 10 hrs. Was paid for 14 hrs. Overpaid 4 hrs. at \$1.50 per hr. ....	6.00
	4/14/45 (Sat.) Time Card recorded 13 $\frac{1}{2}$ hrs. Was paid for 19 hrs. Overpaid 5 $\frac{1}{2}$ hrs. at \$1.50 per hr. ....	8.25
	4/15/45 (Sun.) Time Card recorded 11 $\frac{1}{2}$ hrs. Was paid for 14 hrs. Overpaid 2 $\frac{1}{2}$ hrs. at \$1.50 per hr. ....	3.75
	4/23/45 (Mon.) Time Card recorded 10 $\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$1.50 per hr. ....	.75
	4/25/45 (Wed.) Time Card recorded 10 $\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$1.50 per hr. ....	.75
	4/28/45 (Sat.) Time Card recorded 12 hrs. Was paid for 12 $\frac{1}{2}$ hrs. Overpaid $\frac{1}{2}$ hr. at \$1.50 per hr. ....	.75

## Page

4/29/45 (Sun.) Time Card recorded 12 hrs. Was paid for 13 hrs. Overpaid 1 hr. at \$1.50 per hr.....	\$ 1.50
5/3/45 (Thurs.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/4/45 (Fri.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/5/45 (Sat.) Time Card recorded 2 hrs. Was paid for 5 hrs. Overpaid 3 hrs. at \$1.50 per hr. ....	4.50
5/7/45 (Mon.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/8/45 (Tues.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/9/45 (Wed.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
25 Clyde Burchfield—Crusher Operator— 4/1/45—Crusher Foreman	
4/3/45 (Tues.) Time Card recorded 11 hrs. Was paid for 12 hrs. Overpaid 1 hr. at \$2.625 per hr. ....	2.63
4/25/45 (Wed.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$1.75 per hr. ....	5.25
5/8/45 (Tues.) Time Card recorded 7½ hrs. Was paid for 8 hrs. Overpaid ½ hr. at \$1.75 per hr. ....	.88



Page

26	Clifford Gorby—Oiler	
	3/20/45 (Tues.) Time Card recorded 13 hrs. Was paid for 13½ hrs. Overpaid ½ hr. at \$1.4625 per hr.....	\$ .73
27	Dallas Scott—Tractor Operator	
	3/24/45 (Sat.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$2.25 per hr. ....	1.13
32	Thomar O. Mosley—Shovel Operator	
	4/23/45 (Mon.) Time Card recorded 11 hrs. Was paid for 11½ hrs. Overpaid ½ hr. at \$2.4375 per hr. ....	1.22
	4/29/45 (Sun.) Time Card recorded 12 hrs. Was paid for 12½ hrs. Overpaid ½ hr. at \$2.4375 per hr. ....	1.22
	4/30/45 (Mon.) Time Card recorded 12½ hrs. Was paid for 13 hrs. Overpaid ½ hr. at \$2.4375 per hr. ....	1.22
33	Stacey Wailes—Oiler	
	4/8/45 (Sun.) Time Card recorded 12½ hrs. Was paid for 13 hrs. Overpaid ½ hr. at \$1.4625 per hr. ....	.73
	4/23/45 (Mon.) Time Card recorded 11 hrs. Was paid for 11½ hrs. Overpaid ½ hr. at \$1.4625 per hr. ....	.73
	4/27/45 (Fri.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$.975 per hr. ....	2.93
	4/30/45 (Mon.) Time Card recorded 12½ hrs. Was paid for 13 hrs. Overpaid ½ hr. at \$1.4625 per hr. ....	.73

## Page

36	Charles Collins—Truck Driver	
	4/18/45 (Wed.) Time Card recorded 8 hrs. Was paid for 10½ hrs. Overpaid 2½ hrs. at \$1.50 per hr. ....	\$ 3.75
38	Earl Collins—Truck Driver	
	4/20/45 (Fri.) Time Card recorded 9½ hrs. Was paid for 10 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
40	Willard Roles—	
	Repairman & Crusher Operator	
	No lunch period of ½ hr. was deducted on the records of this employee on the following 48 days: April 5, 6, 10, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30; May 1, 2, 3, 4, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 29, 30, 31; June 1, 2, 3, 4, 7, 9. 48 days at ½ hr. equals 24 hrs. at \$2.0625 per hr. ....	49.50
	3/31/45 (Sat.) Time Card recorded 10 hrs. Was paid for 20 hrs. Overpaid 10 hrs. at \$2.0625 per hr. ....	20.62
	5/28/45 (Mon.) Time Card recorded 10½ hrs. Was paid for 12 hrs. Overpaid 1½ hrs. at \$2.0625 per hr. ....	3.09
	6/6/45 (Thurs.) Time Card recorded 12½ hrs. Was paid for 16 hrs. Overpaid 3½ hrs. at \$2.0625 per hr. ....	7.22

## Page

- 41 Fred T. Tidwell—Tractor Operator  
 No lunch period of  $\frac{1}{2}$  hr. was deducted on the records of this employee on the following 42 days: April 2, 3, 4, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 29, 30; May 1, 2, 6, 8, 9, 12, 13, 14, 16, 17, 21, 22, 23, 24, 27, 28, 29, 30, 31; June 1, 2, 3, 4, 5, 7, 8. 42 days at  $\frac{1}{2}$  hr. equals 21 hrs. at \$2.25 per hr. .... \$47.25
- 3/27/45 (Tues.) Time Card recorded 8 hrs. Was paid for 10 hrs. Overpaid 2 hrs. at \$2.25 per hr. .... 4.50
- 42 Raymond W. Aguilar—Laborer  
 During the week of 4/15 to 4/21 this employee worked only regular hours. However, these 6 hours were extended at the Overtime rate of \$1.3125 in the total amount of \$7.88. These 6 hours should have been extended at the Regular rate of \$.875 in the total amount of \$5.25. Difference of ..... 2.63
- 45 Antonio J. Espinosa—Laborer  
 4/2/45 (Mon.) Time Card recorded  $8\frac{1}{2}$  hrs. Was paid for 9 hrs. Overpaid  $\frac{1}{2}$  at \$1.3125 per hr. .... .66
- 4/8/45 (Sun.) Time Card recorded  $11\frac{1}{2}$  hrs. Was paid for  $12\frac{1}{2}$  hrs. Overpaid 1 hr. at \$1.35 per hr. .... 1.35
- 4/10/45 (Tues.) Time Card recorded  $11\frac{1}{2}$  hrs. Was paid for  $12\frac{1}{2}$  hrs. Overpaid 1 hr. at \$1.35 per hr. .... 1.35

## Page

4/12/45 (Thurs.) Time Card recorded 11½ hrs. Was paid for 12½ hrs. Over- paid 1 hr. at \$1.35 per hr.....	\$ 1.35
4/15/45 (Sun.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$1.35 per hr. ....	.68
4/30/45 (Mon.) Time Card recorded 11 hrs. Was paid for 11½ hrs. Overpaid ½ hr. at \$1.35 per hr. ....	.68
5/11/45 (Fri.) Time Card recorded 16 hrs. Was paid for 17 hrs. Overpaid 1 hr. at \$1.35 per hr.....	1.35
46 Reinaldo Morgan—Laborer	
4/2/45 (Mon.) Time Card recorded 8½ hrs. Was paid for 9 hrs. Overpaid ½ hr. at \$1.3125 per hr. ....	.66
4/8/45 (Sun.) Time Card recorded 11½ hrs. Was paid for 12½ hrs. Overpaid 1 hr. at \$1.3125 per hr.....	1.31
4/9/45 (Mon.) Time Card recorded 8½ hrs. Was paid for 9 hrs. Overpaid ½ hr. at \$1.3125 per hr. ....	.66
4/10/45 (Tues.) Time Card recorded 10 hrs. Was paid for 10½ hrs. Overpaid ½ hr. at \$1.3125 per hr. ....	.66
4/12/45 (Thurs.) Time Card recorded 11½ hrs. Was paid for 12½ hrs. Over- paid 1 hr. at \$1.3125 per hr. ....	1.31
4/27/45 (Fri.) Time Card recorded 9 hrs. Was paid for 11 hrs. Overpaid 2 hrs. at \$1.35 per hr. ....	2.70

Page

	5/11/45 (Fri.) Time Card recorded 16 hrs. Was paid for 17 hrs. Overpaid 1 hr. at \$1.35 per hr.....	\$ 1.35
47	Silas Salverson—Tractor Operator	
	4/22/45 (Sun.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$2.25 per hr.....	1.12
	4/23/45 (Mon.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$2.25 per hr. ....	1.13
	5/14/45 (Mon.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$1.50 per hr. ....	4.50
49	Kenneth E. Hopkins—Truck Driver	
	4/18/45 (Wed.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr. ....	2.50
	5/2/45 (Wed.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.00 per hr. ....	2.00
	5/10/45 (Thurs.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$1.00 per hr.....	3.00
50	Bill Phillips—Truck Driver	
	4/17/45 (Tues.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.00 per hr. ....	2.00
	5/4/45 (Fri.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75

## Page

51	Teodoro M. Rhodeos—Truck Driver 4/17/45 (Tues.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr.....	\$ 2.50
52	Raymond E. Collins—Truck Driver 5/14/45 (Mon.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Over- paid ½ hr. at \$1.50 per hr. ....	.75
53	James E. Jackson—Truck Driver 4/17/45 (Tues.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr. ....	2.50
54	Samuel A. Moreno—Laborer This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time; \$1.3125 Overtime. \$.025 difference times 192 Regular hrs. ....	4.80
	\$.0375 difference times 151½ Over- time hrs. ....	5.68
	5/18/45 (Fri.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$.90 per hr. ....	1.80
	On this page 54 the addition of the "Gross Wages" column should read \$383.15 in lieu of \$383.45 which amount was carried forward to the Summary page. Less computation error of \$.30 in footing column .....	.30

## Page

55	Chester W. Sherman—Tractor Operator	
	4/30/45 (Mon.) Time Card recorded	
	12½ hrs. Was paid for 13½ hrs. Over-	
	paid 1 hr. at \$2.25 per hr.....	\$ 2.25
	5/7/45 (Mon.) Time Card recorded 11	
	hrs. Was paid for 11½ hrs. Overpaid	
	½ hr. at \$2.25 per hr. ....	1.13
	5/18/45 (Fri.) Time Card recorded 2½	
	hrs. Was paid for 4 hrs. Overpaid 1½	
	hrs. at \$1.50 per hr. ....	2.25
56	St. Aubin—Truck Driver	
	4/28/45 (Sat.) Time Card recorded 12½	
	hrs. Was paid for 13 hrs. Overpaid ½	
	hr. at \$1.50 per hr. ....	.75
	5/2/45 (Wed.) Time Card recorded 6	
	hrs. Was paid for 8 hrs. Overpaid 2	
	hrs. at \$1.00 per hr. ....	2.00
	5/11/45 (Fri.) Time Card recorded 7	
	hrs. Was paid for 8 hrs. Overpaid 1	
	hr. at \$1.00 per hr. ....	1.00
58	Frank Basurto—Laborer	
	This employee was listed as a Laborer.	
	Was paid \$.90 Regular time and \$1.35	
	Overtime. Laborers' rates are \$.875	
	Regular time and \$1.3125 Overtime.	
	\$.025 difference times 64 Regular	
	hrs. ....	1.60
	\$.0375 difference times 53½ Overtime	
	hrs. ....	2.01

## Page

59	Ira T. Buchanan—Laborer	
	5/29/45 (Tues.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Over- paid ½ hr. at \$1.35 per hr.....	\$ .68
	6/5/45 (Tues.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Over- paid ½ hr. at \$1.35 per hr. ....	.68
	This employee was listed as a Laborer. Was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.025 difference times 184 Regular hrs. ....	4.60
	\$.0375 difference times 145½ Overtime hrs. ....	5.46
60	Joe M. Chavez—Truck Driver	
	5/2/45 (Wed.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.00 per hr. ....	2.00
	5/7/45 (Mon.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.00 per hr. ....	2.00
63	Garland D. England—Truck Driver	
	5/28/45 (Mon.) Time Card recorded 7½ hrs. Was paid for 8 hrs. Overpaid ½ hr. at \$1.00 per hr. ....	.50
65	Sena Penrod—Truck Driver	
	5/19/45 (Sat.) Time Card recorded 2 hrs. Was paid for 4 hrs. Overpaid 2 hrs. at \$1.50 per hr. ....	3.00



Page

66	Richard J. Rojas—Truck Driver 5/8/45 (Tues.) Time Card recorded 12½ hrs. Overpaid 2 hrs. at \$1.50 per hr. ....	\$ 3.00
67	Arthur Smith—Laborer This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time; \$1.3125 Overtime. \$.0375 difference times 9 Overtime hrs.	.34
68	Victor E. Vasquez—Dumpman 5/3/45 (Thurs.) Time Card recorded 6½ hrs. Was paid for 8 hrs. Overpaid 1½ hrs. at \$.90 per hr. ....	1.35
71	R. Williams—Mechanic, Heavy Duty 5/22/45 (Tues.) Time Card recorded 14 hrs. Was paid for 14½ hrs. Overpaid ½ hr. at \$2.0625 per hr. ....	1.03
	5/27/45 (Sun.) Time Card recorded 12 hrs. Was paid for 12½ hrs. Overpaid ½ hr. at \$2.0625 per hr. ....	1.03
	5/30/45 (Wed.) Time Card recorded 11 hrs. Was paid for 11½ hrs. Overpaid ½ hr. at \$2.0625 per hr. ....	1.03
	6/2/45 (Sat.) Time Card recorded 12½ hrs. Was paid for 13 hrs. Overpaid ½ hr. at \$2.0625 per hr. ....	1.03
	6/4/45 (Mon.) Time Card recorded 14½ hrs. Was paid for 15 hrs. Overpaid ½ hr. at \$2.0625 per hr. ....	1.03

## Page

73	James L. Hill—Tractor Operator 5/29/45 (Tues.) Time Card recorded 7½ hrs. Was paid for 8 hrs. Overpaid ½ hr. at \$1.50 per hr.....	\$ .75
75	William O. Kirkpatrick—Truck Driver During the week 5/13 to 5/19 the hours worked as listed on this page are 8 hrs. Regular and 4 hrs. Overtime. 8 hrs. at Regular rate of \$1.00 per hr. equals \$8.00. 4 hrs. at Overtime rate of \$1.50 per hr. equals \$6.00. \$8.00 plus \$6.00 equals \$14.00. The extension for this week is listed as \$30.00. Error in ex- tension (\$30.00 less \$14.00) .....	16.00
76	John R. Roberts—Truck Driver 5/14/45 (Mon.) Time Card recorded 4½ hrs. Was paid for 8 hrs. Overpaid 3½ hrs. at \$1.00 per hr. ....	3.50
77	Dana H. Burnett—Oiler 5/22/45 (Tues.) Time Card recorded 13 hrs. Was paid for 13½ hrs. Overpaid ½ hr. at \$1.4625 per hr.....	\$ .73
81	Raymond S. Martinez—Laborer This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time; \$1.3125 Overtime. \$.025 difference times 104 Regular hrs. \$.0375 difference times 87 Overtime hrs. ....	2.60 3.26

## Page

82	Otha G. McCoy—Truck Driver 5/18/45 (Fri.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr.....	\$ 2.50
84	Otiractous Burchfield—Dumpman 5/23/45 (Wed.) Time Card recorded 10½ hrs. Was paid for 11½ hrs. Overpaid 1 hr. at \$1.35 per hr. ....	1.35
90	Jack F. Merrill—Spotter 5/28/45 (Mon.) Time Card recorded 11 hrs. Was paid for 12 hrs. Overpaid 1 hr. at \$1.35 per hr. ....	1.35
96	Leslie McDaniel—Tractor Operator On February 19, 1945, this man operated the P. D. O. C. "Carryall" the rental of which was charged for that same day to Duque & Frazzini on a Fully Operated basis on Schedule X. This charge for time is a duplication .....	6.00
97	Rex McCoy—Maintainer Operator On February 20, 21 and 22, 1945, this man operated during all of those three days the P. D. O. C. "R. U. Carryall" the rental of which was charged for that same time to Duque & Frazzini on a Fully Operated basis on Schedule X. This charge for time is a duplication .....	33.75

## General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

## Schedule II

Page

## 3 Hutchins—welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.5625 difference times 4 Overtime hrs. .... \$ 2.25

## 4 David Leon—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 362 Regular hrs. .... 45.25  
\$.1875 difference times 344½ Overtime hrs. .... 64.59

## 5 John Smith—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 394 Regular hrs. .... 49.25  
\$.1875 difference times 383 Overtime hrs. .... 71.81

Page

## 6 Frank Topia—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 360 Regular hrs. .... \$45.00  
\$.1875 difference times 375 Overtime hrs. .... 70.31

## 15 Lew Stephenson—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.125 difference times 16 Regular hrs. .... 2.00  
\$.1875 difference times 9 Overtime hrs. .... 1.69

## 16 Andrew Thomas—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 16 Regular hrs. .... 1.20  
\$.1125 difference times 6 Overtime hrs. .... .68

## Page

## 19 Luther Hart—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.125 difference times 2 Regular

hrs. .... \$ .25

\$.1875 difference times 11 Overtime  
hrs. .... 2.06

On 4/23/45 the Overtime 8 hrs. of this employee was charged to Duque & Frazzini, Regular time on this same day for Basich Bros.

On 4/26/45 the Overtime 3 hrs. of this employee was charged to Duque & Frazzini, Regular time on this same day for Basich Bros.

## 20 Feliciano Talavera—Laborer

This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime.

\$.025 difference times 8 Regular hrs. .20

\$.0375 difference times 1½ Overtime  
hrs. .... .06

Page

23 Manuel Villareal—Laborer

On 5/2/45 (Wed.) this employee's Regular time of 7 hrs. was entered on Basich Bros. payroll sheets twice, and the 14 hrs. were added into the total 33½ hrs. Regular time for that week. This extra 7 hrs. at \$.875 per hr. amounts to \$6.12. Basich Bros. apparently caught this error before issuing the payroll check, and paid this employee for the correct \$49.44 or \$6.12 less than the \$55.56 charged to Duque & Frazzini. Overcharge.....\$ 6.12

24 Anthony Lesnett—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.1875 difference times 1 Overtime hr. .... .19

General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

## Schedule III

## Page

## 2 Jesus Fimbres—Oiler

6/10/45 (Sun.) Time Card recorded 12½ hrs. Was paid for 14 hrs. Overpaid 1½ hrs. at \$1.4625 per hr. .... \$ 2.19

6/11/45 (Mon.) Time Card recorded 11½ hrs. Was paid for 13½ hrs. Overpaid 2 hrs. at \$1.4625 per hr. .... 2.93

6/15/45 (Fri.) Time Card recorded 13 hrs. Was paid for 14½ hrs. Overpaid 1½ hrs. at \$1.4625 per hr. .... 2.19

## 3 David Leon—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 360 Regular hrs. .... 45.00

\$.1875 difference times 437½ Overtime hrs. .... 82.03

## 4 Raymond Martinez—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 440 Regular hrs. .... 55.00

\$.1875 difference times 470 Overtime hrs. .... 88.13



Page

6 John Smith—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 469 Regular hrs..... \$58.63  
 \$.1875 difference times 527 Overtime hrs. .... 98.81

7 Frank Topia—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 136 Regular hrs. .... 17.00  
 \$.1875 difference times 197½ Overtime hrs. .... 37.03

10 Ted Drew—Shovel Operator

This employee was listed as a Shovel Operator but was paid \$1.75 Regular time and \$2.625 Overtime. Shovel Operators' rates are \$1.625 Regular time and \$2.4375 Overtime. \$.125 difference times 8 Regular hrs. .... 1.00  
 \$.1875 difference times 2 Overtime hrs. .... .38

## Page

## 11 Allen Faust—Oiler

This employee was listed as an Oiler but was paid \$1.25 Regular time and \$1.875 Overtime. Oilers' rates are \$.975 Regular time and \$1.4625 Overtime. \$.275 difference times 8 Regular hrs..... \$ 2.20  
\$.4125 difference times 2½ Overtime hrs. .... 1.03

## 13 Fred Hutchins—Welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.375 difference times 10 Regular hrs. .... 3.75  
\$.5625 difference times 20 Overtime hrs. .... 11.25

## 15 Charles Stitt—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 216 Regular hrs. .... 27.00  
\$.1875 difference times 190½ Overtime hrs. .... 35.72

Page

18 Zetti Swinney—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 328 Regular hrs. .... \$24.60  
\$.1125 difference times 212 Overtime hrs. .... 23.85

21 Mitar Janicich—Laborer

This employee was listed as a Laborer but was paid \$1.125 Regular time and \$1.6875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.25 difference times 176 Regular hrs. .... 44.40  
\$.375 difference times 133½ Overtime hrs. .... 50.06

24 Gabriel Albiso—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 152 Regular hrs. .... 19.00  
\$.1875 difference times 136½ Overtime hrs. .... 25.67

## Page

## 25 Andre Thomas—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 120 Regular hrs. .... \$ 9.00  
\$.1125 difference times 79½ Overtime hrs. .... 8.94

## 23 Encarnation Valerio—Laborer

This employee was listed as a Laborer but was paid \$1.125 Regular time and \$1.6875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.375 difference times 10 Overtime hrs. .... 3.75

## 26 Henry Haskin—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime, but the differences were below \$1.00 in total.

## 27 Joe Hayes—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime, but the differences were below \$1.00 in total.

Page

- 28 Enguirque Salas—Laborer  
 This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime, but the differences were below \$1.00 in total.
- 34 David Mazon—Laborer  
 This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 56 Regular hrs. ..... \$ 7.00  
 \$.1875 difference times 56½ Overtime hrs. .... 10.59
- 35 Feliciano Talavera—Laborer  
 This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 48 Regular hrs. .... 6.00  
 \$.1875 difference times 34½ Overtime hrs. .... 6.47
- 36 Jose Verdugo—Laborer  
 This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular hrs. .... 1.00  
 \$.1875 difference times 2 Overtime hrs. .... .38

## Page

## 37 Joe McDaniels—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 32 Regular hrs. .... \$ 4.00  
\$.1875 difference times 28 Overtime hrs. .... 5.25

## 38 Bob Black—Mechanic

This employee was listed as a Mechanic but was paid \$1.75 Regular time and \$2.625 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.5625 difference times 8 Overtime hrs. .... 4.50

## 39 Howard Robinson—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.125 difference times 22½ Regular hrs. .... 2.81  
\$.1875 difference times 27 Overtime hrs. .... 5.06

## 40 Samuel Wilson—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Over-

Page

time. \$.125 difference times 40 Regular	
hrs. ....	\$ 5.00
\$.1875 difference times 11½ Overtime	
hrs. ....	2.16

General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

Schedule IV

8 Raymond Lucas—Shovel Operator

6/9/45 (Sat.) This employee operated the P. D. C. Shovel No. 108, the rental of which was charged for the same day to Duque & Frazzini on a Fully Operated basis, Schedule XIX. Duplication of 11 hrs. Overtime at \$2.4375 per hr. .... 26.81

15 Maksin Pesko—Laborer

This employee was listed as a Laborer but was paid from 6/10 to 6/16 at the rates of \$.125 Regular time and \$1.6875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.25 difference times 8 Regular hrs. .... 2.00  
\$.375 difference times 12 Overtime hrs. 4.50

## Page

## 19 Fred Hutchins—Welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.375 difference times 1 Regular hr. .... \$ .38  
\$.5625 difference times 4 Overtime hrs. 2.25

## General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

## Schedule V

## 2 Encarnation Valero—Laborer

This employee was listed as a Laborer but was paid \$1.125 Regular time and \$1.6875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.375 difference times 10 Overtime hrs. .... 3.75

## 4 Vance Evans—Laborer

This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.025 difference times 120 Regular hrs. .... 3.00  
\$.0375 difference times 70½ Overtime hrs. .... 2.64



## Page

## 6 Joe Hayes—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 163½

Regular hrs.....	\$20.44
\$.1875 difference times 95 Overtime hrs. ....	17.81

## 9 Feliciano Talavera—Laborer

This employee was listed as a Laborer but was paid from 6/10 to 8/25 at the rates of \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime.

\$.025 difference times 156 Regular hrs.	3.90
\$.0375 difference times 93 Overtime hrs. ....	3.49

## 11 Lew Stevenson—Mechanic &amp; Fireman

This employee was listed as a Mechanic & Fireman but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' & Firemen's rates are \$1.375 Regular time and \$2.0625 Overtime. \$.125

difference times 131 Regular hrs. ....	16.38
\$.1875 difference times 93½ Overtime hrs. ....	17.53

## Page

## 17 David Mason—Laborer

This employee was listed as a Laborer but was paid from 6/10 to 8/25 at the rates of \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.025 difference times 96 Regular hrs... \$ 2.40  
\$.9375 difference times 70 Overtime hrs. .... 2.63

## 18 Tom Harmon—Laborer

This employee was listed as a Laborer but was paid at the rates of \$.95 Regular time and \$1.465 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 8 Regular hrs. .... .60  
\$.1525 difference times 3 Overtime hrs. .... .46

## 19 Fred Hutchins—Welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.375 difference times 11 Regular hrs. .... 4.13  
\$6.5625 difference times 21½ Overtime hrs. .... 12.09

## 23 Benny Dixon—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 33 Regular hrs. .... 4.13

## Page

## 24 Clarence Williams—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 33 Regular hrs. .... \$ 4.13  
\$.1875 difference times 13 Overtime hrs. .... 2.44

## 26 Eddie Byas—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.1875 difference times 9 Overtime hrs. .... 1.69

## 27 Raymond Martinez—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular hrs. .... 1.00  
\$.1875 difference times 2 Overtime hrs. .... .38

## 30 Eugene Miller—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 16 Regular hrs. .... 2.00  
\$.1875 difference times 4 Overtime hrs. .... .75

## Page

## 31 Samuel Wilson—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular hrs. .... \$ 1.00  
\$.1875 difference times 3 Overtime hrs. .56

## 32 Samuel Forrest—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular hrs. .... 1.00  
\$.1875 difference times 2 Overtime hrs. .38

## General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

## Schedule VI as Amended

Plaintiff has not exhibited to defendant evidence of authority for the rating used in computing Workmen's Compensation charges.

Plaintiff has not exhibited to defendant evidence to show [465] that Duque & Frazzini were protected in any way by a Public Liability and Property Damage policy under which charges are made, \$611.09.

Comments on Schedules I to V illustrate that all charges in Schedule VI as amended are computed on incorrect totals.

#### Schedule VII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the sub-contract work or to charge any amounts to the defendant.

#### Schedule VIII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the sub-contract work or to charge any amounts to the defendant.

#### Schedule IX

Plaintiff has not exhibited to defendant records of production measurements for this equipment on which royalty charges are based, as per contract between plaintiff and Duque & Frazzini, dated May 1, 1945, defendant's Exhibit "B".

This Schedule shows royalty charges for sand production on the basis of 995 tons. Schedule XVII shows royalty charges for sand production on the basis of 2,223 tons, a total of 3,218 tons of sand. The credit allowed for sand production in Schedule XXXIV (XLIV), however, is 751 tons of sand.

## Schedule X

## Page

1	4/5/45 Time card recorded 10 $\frac{1}{2}$ hrs. for Dozer 428. Payment for 8 hrs. Regular time and 4 $\frac{1}{2}$ hrs. Overtime. Overpaid 2 hrs. at \$10.20 per hr. ....	\$20.40
---	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------

Comments on Schedule I, pp. 96 and 97, indicate duplication of labor charge where carryall was listed on a fully operated basis. Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

## Schedule XI

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

## Schedule XII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

## Schedule XIII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant. [467]

## Schedule XIV

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

## Schedule XV

Plaintiff charged Duque & Frazzini the standard rate for this equipment which apparently includes profit.

## Schedule XVI

Plaintiff charged Duque & Frazzini the standard rate for this equipment which apparently includes profit.

## Schedule XVII

Plaintiff charged Duque & Frazzini the standard rate for this equipment which apparently includes profit.

Plaintiff has not exhibited to defendant records of production measurements for this equipment on which royalty charges are based.

See also comments on Schedule IX.

## Schedule XIX

Comments on Schedule IV, p. 8, indicate duplication of labor charge where Shovel No. 108 was listed on a fully operated basis. [468]

## Schedule XX

Plaintiff has not exhibited to defendant records of production measurements for this equipment on which royalty charges are based.

## Schedule XXI

Page

1	6/30/45	J. G. North's yellow time sheets and Mr. Thompson's Journal book recorded 99 truck hrs. Payment for 179½ truck hrs. Overpaid 80½ hrs. at \$4.13 per hr. ....	\$332.47
3	8/22/45	J. G. North's yellow time sheets recorded 56 truck hrs. Payment for 77 truck hrs. Overpaid 21 hrs. at \$4.13 per hr. ....	\$86.73

## Schedule XXII

Invoices from Phoenix Tempe Stone to Plaintiff of \$2,761.58 for the use of this equipment were not on a fully operated basis. Plaintiff charged Duque & Frazzini \$6,102.05, the standard rate for fully operated equipment which apparently includes profit.

## Schedule XXIV

Two bins rented for 2 months and 23 days. Plaintiff charged Duque & Frazzini for 3 full months. Overcharged 7 days at \$90.00 per month .....

\$21.00

## Schedule XXVI

Plaintiff has not exhibited to defendant evidence showing authority to repair the equipment or to charge any amounts to defendant.



## Schedule XXVII

Plaintiff has not exhibited to defendant evidence showing authority to purchase parts for the equipment or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing the equipment on which such parts were used.

## Schedule XXVIII

Plaintiff has not exhibited to defendant evidence showing authority to use parts from plaintiff's stock or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing the equipment on which such parts were used.

## Schedule XXIX

Plaintiff has not exhibited to defendant evidence showing authority to issue fuel, grease and oil for equipment or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing where such fuel, grease and oil were used.

## Schedule XXX

Plaintiff has not exhibited to defendant evidence showing authority for moving and setting up the Pioneer Crusher, Tucson Mac E. Eng., providing accounting services, telephone charges or authority to charge any amounts to defendant. [470]

## Schedule XXXI

Plaintiff has not exhibited to defendant evidence showing authority to pay freight on equipment or to charge any amounts to defendant. The absence of dates on this Schedule prevents vouching to specific invoices.

## Schedule XXXII

Plaintiff has not exhibited to defendant evidence showing the equipment on which such repairs were made.

## Schedule XXXIII

Plaintiff has not exhibited to defendant evidence showing the equipment on which the parts were used.

## Schedule XXXIV

No dates were given on this Schedule. Plaintiff has not exhibited to defendant evidence showing authority to use parts from plaintiff's stock or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing the equipment on which such parts were used.

## Schedule XXXV

Plaintiff has not exhibited to defendant evidence showing the equipment on which such fuel, grease and oil were used.

## Schedule XXXVI

Plaintiff has not exhibited to defendant evidence of authority for the rating used in computing Workmen's Compensation charges. [471]

## Schedule XXXVII

Plaintiff has not exhibited to defendant evidence showing authority to pay freight on equipment or to charge any amounts to defendant. The absence of dates on this Schedule prevents vouching to specific invoices.

The Fully Operated Shovel 37B, owned by Phoenix Tempe Stone Co., was left for plaintiff's use on the express condition that there should be no freight charge to Duque & Frazzini for its return .....\$360.50

Schedule XXXVIII

The total quantity in this schedule should be 54,864 c.y., not 54,764 c.y.

100 c.y. at \$.46 c.y.....Add \$46.00

Schedule XXXIX

Article XXII, Item 11 of the alleged subcontract, Plaintiff's Exhibit "1" provides as follows for this Item. "Measurement to be computed on truck water level." Measure for purposes of credit to Duque & Frazzini is made by this Schedule dividing square yards in place by 15.

Further, this Schedule does not credit Duque & Frazzini with 32,751 sq. yd. as shown on U. S. Engineers' Estimates No. 13 Extension, June 15 to July 31, 1945, Defendant's Exhibit "D."

Schedule XXXXII (XLII)

Engineers' Estimates for Items No. 26A and 26B were 24,500.16 tons, Defendant's Exhibit "D." Plaintiff has not exhibited to Defendant evidence of authority to deduct oil tonnage or evidence [472] that oil tonnage deductions are not included in the Engineers' Estimates. Difference of 841.81 tons at \$.65 per ton .....Add \$547.18

## Schedule XXXIV (XLIV)

See comments on Schedule IX.

Received copy of the within memorandum this 31st day of January, 1947.

STEPHEN MONTELEONE and  
TRACY J. PRIEST,  
By STEPHEN MONTELEONE,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 4, 1947. [473]

---

[Title of District Court and Cause.]

DECISION AND ORDER FOR  
JUDGMENT AND FINDINGS

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the plaintiff and against defendants as prayed for in the Complaint, the exact amount to be computed under Local Rule 7(g) by counsel for the plaintiff, in conformity with the corrected bill of particulars as finally proved at the trial of the cause.

Findings and Judgments to be prepared by counsel for the plaintiff under Local Rule 7.

I am of the view, after a full consideration of the case in the light of the additional testimony introduced on February 4th and 5th, 1947, that the plaintiff is entitled to recover and that the evidence

does not sustain any of the defenses which have been raised by the averments in the [474] Answer or as legal propositions based upon the facts as a whole.

Ordinarily, no other direction would be necessary. However, because of the nature of the case, and the desire for a quick determination, and in order to avoid any dispute as to the certain special issues arising in the case, I indicate, as I have done repeatedly in cases of this character, certain special findings and conclusions. These relate particularly to the defenses interposed either by specific allegations or urged as legal principles. They are stated, in the main, in the order in which they appear in the affirmative defenses, although the particular defenses may not necessarily be referred to in each instance.

So I find:

I.

The Complaint states a claim upon which relief can be granted and the evidence fully establishes such claim.

II.

The defendant surety company has had notice of any and all complaints, deficiencies and failures in the performance of the contract by Duque & Frazzini, the obligee and subcontractor, of which the plaintiff complains.

III.

Prior to the final abandonment of the work by Duque & Frazzini on June 8, 1945, notice of which

was given on the same day by letter to the surety and obligee, various complaints had been brought to the attention of the surety of deficiencies in the work. They sent a representative who had access to all the books and who sought to secure the improvement of conditions.

#### IV.

On the final abandonment of the work on June 8, 1945, immediate notice was given to the surety and obligee [475] of such abandonment and of previous complaints about the nature of the work. In said letter request was made for full performance by them and notice given that any action to be taken by the plaintiff was merely to minimize damage. No offer to perform was made by the surety. Nor did they request the plaintiff to desist from continuing the work in order to minimize damage, until adjustment or until the surety company chose to take over further performance. On the contrary, the surety's answer to that and subsequent letters—especially the letter of the counsel for the surety, dated June 23, 1945—merely referred to the contract as the measure of their liability. And, while notifying the plaintiff that the surety “will not recognize any claim (they) may make which is not expressly covered by the terms of its contract bond,” it, at no time, asked a cessation of labor or indicated a desire to take over performance of the contract of the obligee. Under the circumstances, the defendant cannot claim that it was not given an opportunity to proceed with performance, as it alleges in the third affirmative defense.

## V.

Plaintiff has performed faithfully with the condition of the contract of surety and has not violated any of the conditions of the subcontract. More particularly, with reference to the allegations of the fourth affirmative defense, I find, as expressed orally at the conclusion of the trial, that the arrangement whereby the plaintiff paid direct to the laborers their wages earned from the obligee upon weekly payrolls furnished and certified to by the obligee, was not a violation of the terms of the contract, but was an arrangement made for the benefit of the obligee which inured also to the benefit of the surety who had knowledge of the fact, as their representative not only had [476] access to the payrolls and books, but actually had examined them during the period in which the payments were being made.

For like reason, the surety cannot complain and was not injured by the fact that the employees of the obligee were carried on the plaintiff's rolls for the purpose of income tax withholding, social security and unemployment insurance returns, workmen's compensation policies, public liability and property damages. Nor can surety complain because the plaintiff rented directly to, or through others for the benefit of, the obligee, equipment needed by them in the performance of the contract. As to all these, the evidence shows conclusively that the arrangement was made for the benefit of the obligee, that the amounts paid out were upon the order of the obligee and were the reasonable value

of the services and materials secured and the equipment furnished. No profit was charged against the obligee on any of these advances, and where the equipment furnished was owned by plaintiff, the charge was the regular OPA charge which it has also been shown without contradiction to be reasonable.

## VI.

No payments have been made to the contractor other than called for by the subcontract by the plaintiff and the obligee. While it is true that some payments were made for labor, materials and the like, before any actual payments were due to the subcontractor, these were merely in the form of bookkeeping entries showing charges and advances made for the benefit of the obligee. At no time did the sums so advanced exceed the progress payments and if the last charges and advances did so exceed the progress payment, it is merely because upon the abandonment of the contract, the surety did not choose to take over the contract [477] for completion and the plaintiff was compelled to complete the same.

All these facts were known to the surety who had access to the books and actually investigated them. Under the circumstances, there was no concealment of which the surety can complain.

## VII.

I find that the plaintiff has not, at any time, by any act which it did prior or subsequent to June 8, 1945, waived or abandoned its right to demand full



performance of the contract. In this respect, I find specifically that the arrangement whereby the payments set forth in Finding V were made did not constitute in law a change in the terms of the contract or an alteration in the relationship between the plaintiff and the obligee affecting the rights of the surety. Also, that it is not true, as alleged in the eighth affirmative defense, that the plaintiff did, at any time, control or direct the employees of the obligee, but that, on the contrary, they were, at all times until the abandonment of the work, under the sole and exclusive control of Duque & Frazzini or their agents. Consequently, although the contract of the surety is, as I determined previously, at the hearing of November 25, 1946, to be governed by California law, there has been no deviation in its terms which can be called of substance. On the contrary, its terms have been complied with substantially by the plaintiff and the obligee, and such deviations as were made as to advances or manner of computing work did not change the contract in any substantial manner, and were made with the consent of the obligee and for their benefit and the benefit of the surety, and that the surety had actual knowledge or means of knowledge, and by failing to raise any objection [478] waived a more strict compliance.

### IX.

I find that not only do the facts show a waiver in the matters just referred to, but that the entire

conduct of the surety amounts to waiver of performance of the conditions of which they complain in the special defenses and as to all other matters.

X.

In all their negotiations, the conduct of the surety in dealing with any complaints which came to their attention, even after the abandonment, was such that they lulled the plaintiff into a feeling of security that efforts were being made to adjust the differences and that no affirmative action was forthcoming on the part of the surety. An attitude like this is like the "indulgence" extended to one after a complaint of fraud is made and which results in delay of rescission. He who induces such indulgence is not in a position to complain of it. (*Noll v. Baida*, 1927, 202 C. 105, 108; *Hunt v. L. M. Field Inc.*, 1927, 202 C. 701, 704.)

So the plaintiff here is entitled to a finding of waiver and estoppel as pleaded in the amendment to the complaint, filed on December 28, 1946.

Dated this 11th day of February, 1947.

/s/ LEON R. YANKWICH.

United States District Judge.

Counsel notified.

[Endorsed]: Filed Feb. 11, 1947. [479]

[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above entitled action came on regularly for trial in the District Court of the United States, Southern District of California, Central Division, before the Honorable Leon R. Yankwich, Judge presiding, on the 25th day of November, 1946, and thereupon regularly continued for further proceedings which were had on the 4th day and 5th day of February, 1947, Stephen Monteleone, Esq., and Tracy J. Priest, Esq., appearing as attorneys for plaintiff, Basich Brothers Construction Company, a corporation, and John E. McCall, Esq., appearing as attorney for the [480] defendant, Glens Falls Indemnity Company, a corporation; (defendants Andrew Duque and Carson Frazzini, co-partners, doing business under the name of Duque & Frazzini, not having been served with summons and not having appeared, the trial proceeded against the defendant, Glens Falls Indemnity Company, a corporation, alone).

A jury trial having been duly waived by the respective parties, the cause was tried before the Court without a jury, whereupon evidence, both oral and documentary, was introduced by and on behalf of said plaintiff Basich Brothers Construction Company, a corporation, and said defendant Glens Falls Indemnity Company, a corporation, respectively, and the Court having heard and con-

sidered said evidence, together with the argument of respective counsel for said plaintiff and said defendant, and being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

### Findings of Fact

#### I.

The Court finds that each, every and all allegations contained in Paragraphs I, II, III and IV of plaintiff's complaint on file herein are true.

#### II.

The Court finds that on the 25th day of January, 1945, said plaintiff, Basich Brothers Construction Company, a corporation, hereinafter referred to as "Basich," entered into a certain written contract with the United States of America by and through the Engineering Department thereof, for the furnishing of materials and performing of work for the construction of taxiways, warm-up and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities necessary [481] at what is known as Davis-Monthan Airfield near Tucson, Arizona, said contract being known as No. W-04-353-Eng-1302 and having job No. Davis-Monthan E.S.A. 210-6, 210-8 and 210-9.

## III.

The Court finds that on the 7th day of February, 1945, said plaintiff, "Basich" and said Duque & Frazzini entered into a written subcontract for the performance of certain work and the furnishing of certain material as set forth in said subcontract, a true copy of which said subcontract is attached to plaintiff's said complaint, marked Exhibit "A" and made a part thereof, and was received in evidence as plaintiff's Exhibit 1; that the work to be performed and the material to be furnished under said subcontract by said Duque & Frazzini were essential to the performance by plaintiff of the work required to be performed under said contract with the United States of America.

## IV.

The Court finds that on February 20, 1945, and in conformity with the requirements of Article XXII of said subcontract, defendant, Glens Falls Indemnity Company, a corporation, hereinafter referred to as "Glens Falls," for a valuable consideration paid to it as a premium, made, executed and delivered to plaintiff within the Southern District of California, Central Division, a subcontract bond in the penal sum of \$101,745.55, wherein said Duque & Frazzini, as principal, and said defendant, Glens Falls, as surety are, by the terms thereof, held and firmly bound unto plaintiff, Basich, for the faithful performance of the work to be done under the terms of the aforesaid subcontract between plaintiff and said Duque & Frazzini.

That a true copy of said subcontract bond is attached to plaintiff's complaint, marked Exhibit "B" and made a part thereof and was received in evidence as plaintiff's Exhibit 2; that on March 7, 1945, defendant, Glens Falls, modified in writing said bond by adding thereto the following: "It is hereby understood and agreed that the 10 days appearing in Paragraph 'First' is changed to read twenty (20) days."

#### V.

The Court finds that the aforesaid subcontract between plaintiff and said Duque & Frazzini and the aforesaid subcontract bond executed by the defendant, Glens Falls, as surety, constitute the agreement between plaintiff and said Duque & Frazzini and said defendant, Glens Falls. The Court finds that it was the intention of the parties that provisions of said subcontract to be performed by said Duque & Frazzini were and are obligations included within the obligations of said subcontract bond.

#### VI.

The Court finds that at all times herein mentioned following the execution and delivery of said bond by defendant, Glens Falls, to plaintiff, Basich, as aforesaid, said bond remained in full force and effect and still is in full force and effect.

## VII.

The Court finds that plaintiff has fully done and performed each and every act in its part to be performed under the terms of said subcontract and said subcontract bond and has fully done and complied with each and every condition precedent therein contained required of it to be performed by said subcontract and said subcontract bond in order to entitled plaintiff to recover from said defendant, Glens Falls, for all losses sustained by said plaintiff by reason of the failure of said Duque & Frazzini to faithfully perform the requirements of said subcontract as found in these Findings of Fact.

## VIII.

The Court finds that each and every allegation contained in Paragraph IX of said complaint is true. [483]

## IX.

The Court finds that said Duque & Frazzini entered upon the performance of the requirements of their said subcontract with plaintiff, but failed to prosecute said work therein required of them continuously with sufficient workmen and/or equipment, or to erect two plants each capable of producing 800 cubic yards of suitable material a day and that after commencing work under said subcontract and, on or about April 5, 1945, said Duque & Frazzini failed to have or thereafter to maintain sufficient workmen and/or sufficient equipment as in said subcontract required of them.

## X.

The Court finds that said Duque & Frazzini after they commenced work, as required in said subcontract, failed to pay labor or equipment or material bills, hereinafter specifically found, on account of labor performed and/or materials and/or equipment furnished to them in connection with the performance of said subcontract with plaintiff and further said Duque & Frazzini failed to faithfully perform the work and requirements therein contracted to be done as herein specifically found. That on account of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done as in said subcontract specified, plaintiff did, under date of April 5, 1945, by registered mail, notify said defendant, Glens Falls, and said Duque & Frazzini that the plant of said Duque & Frazzini was not producing 800 cubic yards of suitable material as required in said subcontract and that Duque & Frazzini move in additional equipment to insure proper completion of their said subcontract. That the notice given to said defendant, Glens Falls, as aforesaid, constituted notice to said defendant as required by the terms of said subcontract bond. [484]

## XI.

The Court finds that said Duque & Frazzini thereafter continued to work under said subcontract with plaintiff until its final abandonment on June 8, 1945, and that said defendant Glens Falls, following said notice of April 5, 1945, through its duly au-



thorized agents and representatives, fully investigated the facts and conditions relative to said complaint in said notice contained and was thereby fully advised of all of the facts thereto pertaining.

## XII.

The Court finds that on or about April 27, 1945, said Duque & Frazzini, having still failed to faithfully perform the work contracted to be done under said subcontract with plaintiff, plaintiff did, under date of April 27, 1945, by registered mail, notify said defendant, Glens Falls, and said Duque & Frazzini of the failure of said Duque & Frazzini to faithfully perform the work required of them under said subcontract and that plaintiff would make all reasonable efforts, either in attempting to procure sufficient equipment to produce the deficiency in material required of said Duque & Frazzini under said subcontract, or attempt to procure the deficiency of materials through other sources and make all charges or other reasonable expenses in connection therewith against said defendant, Glens Falls, and said Duque & Frazzini.

## XIII.

The Court finds that plaintiff, upon acquiring knowledge of any and all failures of Duque & Frazzini to comply with any of the provisions of the subcontract, properly complied with all conditions precedent of the bond and gave notice thereof to defendant, Glens Falls, in the manner and within

the time in said bond provided and that said defendant, Glens Falls, was afforded an opportunity by plaintiff in accordance with the condition precedent of said bond to see that the provisions of the subcontract [485] were complied with.

#### XIV.

The Court finds that plaintiff, at no time, waived any of its rights, nor did it at any time elect to perform, nor did it perform any act inconsistent with the conditions of the subcontract bond or the right of said plaintiff to collect upon said bond for all losses occasioned by the subcontractor's default.

#### XV.

The Court finds that from the commencement of said work by said Duque & Frazzini under said subcontract up to and until the abandonment thereof on June 8, 1945, plaintiff paid direct to laborers employed by said Duque & Frazzini wages of said laborers earned from said Duque & Frazzini upon weekly payrolls furnished and certified to by said Duque & Frazzini in the amounts hereinafter specifically found and also paid Workmen's Compensation Insurance, Arizona Unemployment Reserve Commission, Federal Old Age and Excise Tax in the amounts hereinafter specifically found; that each and all of said payments were required to be made by said Duque & Frazzini under said subcontract and were made by plaintiff, as aforesaid, in accordance with an arrangement provided in said subcontract for the benefit of said Duque &

Frazzini and which also inured to the benefit of said defendant, Glens Falls, who had, at all times herein mentioned, knowledge of the manner and amounts of said payments.

The Court finds that from the commencement of said work by Duque & Frazzini under said subcontract until the abandonment thereof on June 8, 1945, plaintiff rented direct to, or through others for the benefit of said Duque & Frazzini and on the orders of said Duque & Frazzini, certain equipments, in the amounts hereinafter found, and also sold direct to, or through others for the benefit of said Duque & Frazzini, and on the orders of said Duque & Frazzini, certain supplies and material, in the amounts hereinafter [486] specifically found.

#### XVI.

The Court finds that all of the labor, insurance, equipment, supplies, materials and other items hereinabove specified furnished or paid by plaintiff for the benefit of said Duque & Frazzini were necessary for and were actually employed by said Duque & Frazzini in the performance of said subcontract and the respective amounts thereof for each and every item was and is reasonable and fair.

#### XVII.

The Court finds that the amount of labor, insurance, rentals on equipment, material supplies and other items paid or furnished by plaintiff for the benefit of said Duque & Frazzini as hereinabove

found, are fully, correctly and specifically set forth in the Bill of Particulars and Amendments thereto as corrected on file herein and consist of the following general subject and amount, to-wit:

Payroll for labor .....	\$47,174.32
Insurance .....	6,202.74
Equipment rental .....	24,438.70
Supplies .....	8,130.74
Or a total of .....	\$85,946.50

The Court finds that each and all of the above items and all of the above items were and are reasonable and were necessarily expended in the performance of said subcontract work, as aforesaid and that the said respective sums are the actual payments made by plaintiff for the account of said Duque & Frazzini or the reasonable rental value of the equipment furnished said Duque & Frazzini in the performance of said subcontract as hereinabove found.

#### XVIII.

The Court finds that during the period of time from the [487] commencement of said work by said Duque & Frazzini under said subcontract up to the abandonment thereof on June 8, 1945, said Duque & Frazzini had earned, under said subcontract with plaintiff a gross amount of \$56,080.11 all of which amount is fully, correctly and specifically set forth in said Bill of Particulars on file herein. The Court therefore finds that said Duque & Frazzini and defendant, Glens Falls are entitled to credit up to the date of the abandonment of said subcon-

tract on June 8, 1945, in said sum of \$56,080.11, leaving a balance due, owing and unpaid on said 8th day of June, 1945, from said Duque & Frazzini and said defendant, Glens Falls, in the principal sum of \$29,866.39, together with interest thereon at the rate of seven per cent per annum from the 8th day of June, 1945, on account of the facts herein found.

### XIX.

The Court finds that on June 8, 1945, before the completion by Duque & Frazzini of the work provided for in said subcontract with plaintiff, said Duque & Frazzini notified plaintiff in writing that they were suspending their said operation and thereupon and on said 8th day of June, 1945, without the consent of plaintiff, and without any fault on the part of plaintiff, said Duque & Frazzini finally and completely abandoned said work; that said defendant, Glens Falls, was, at all times, promptly notified by registered mail of the aforesaid acts and omissions of said Duque & Frazzini and upon the abandonment of said operations on June 8, 1945, plaintiff thereupon and on June 11, 1945, notified said defendant, Glens Falls, by registered mail that, as surety of said Duque & Frazzini, it take such action as it may deem proper and that until it did so plaintiff, as Prime Contractor, upon demand of the War Department, would proceed with the work for the benefit of said Duque & Frazzini and said defendant Glens Falls, and would comply with their reasonable instructions. That

said defendant, Glens Falls, however, took no action whatever in the completion of the work abandoned by said Duque & Frazzini, as aforesaid, and plaintiff was compelled to complete the same.

The Court finds that said plaintiff did, at its own expense, furnish all necessary labor, material and equipment to complete, and did complete the work covered by its said subcontract with Duque & Frazzini after the same was abandoned, as aforesaid; that plaintiff necessarily and actually expended the amounts and furnished labor, material, machinery and equipment in completing said subcontract after said abandonment thereof all of which are fully, correctly and specifically set forth in said Bill of Particulars and the said amendment, as corrected, and consist of the following general subject and amounts:

Payroll for labor .....	\$ 18,284.16
Insurance .....	2,521.44
Equipment rental .....	79,612.65
Repairs, parts, supplies and miscellaneous labor .....	15,052.11
Or a total amount of .....	\$115,470.36

## XX.

The Court finds that each, every and all of said above items were necessarily and actually expended by plaintiff in completing the work agreed to be done and performed by Duque & Frazzini after the abandonment thereof, as aforesaid, and the said respective sums were and are the reasonable and

fair cost thereof and the actual cost to plaintiff of labor, materials, supplies, rental and equipment necessarily required in the completion of said subcontract for the account of said Duque & Frazzini, subcontractor.

### XXI.

The Court finds that said Duque & Frazzini and defendant, Glens Falls, are entitled to a credit of \$65,753.84 on account of the gross earnings based on the subcontract price which would have been due said Duque & Frazzini from the date of said abandonment [489] on June 8, 1945, had they fully performed the said subcontract work. That there is, therefore, a further balance due, owing and unpaid from said Duque & Frazzini and defendant, Glens Falls, to plaintiff by reason thereof in the principal sum of \$49,716.52 together with interest thereon at the rate of seven per cent per annum from the date of the completion of said work on September 25, 1945, on account of said subcontractor's default and abandonment of said work on June 8, 1945. That said principal sum of \$49,716.52 together with interest thereon at seven per cent per annum from September 25, 1945, is the actual loss to plaintiff by reason of the subcontractor's abandonment of said work, as aforesaid.

### XXII.

The Court finds that by reason of the default of said Duque & Frazzini, as herein found, and by reason of their failure to faithfully perform said

subcontract in accordance with the terms, as herein found, plaintiff has suffered a loss in the total principal sum of \$79,582.91, together with interest as hereinabove found. That although said Duque & Frazzini and defendant, Glens Falls, and each of them have been requested to pay said principal and interest, they have failed and refused to pay the same or any part thereof and the whole of said principal sum and interest is due, owing and unpaid.

### XXIII.

The Court finds that each and every affirmative allegation set forth in the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

### XXIV

The Court finds that plaintiff's complaint states a claim upon which relief can be granted and the evidence fully establishes such claim. [490]

### XXV.

The Court finds that each and every allegation set forth in the second and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue except as in these findings are expressly found to be true.

### XXVI.

The Court finds that each and every allegation set forth in the third affirmative defense of the



First Amended Answer of defendant, Glens Falls, are untrue except as in these findings expressly found to be true. It is true plaintiffs, after subcontract work was abandoned by Duque & Frazzini on June 8, 1945, completed all work remaining to be done under said subcontract but the completion thereof by plaintiff, as aforesaid, was for the account of said Duque & Frazzini. The Court finds that on the final abandonment of the subcontract work by Duque & Frazzini on June 8, 1945, notice was properly and promptly given to said defendant, Glens Falls, and request therein made of it for full performance by said defendant and said Duque & Frazzini of said subcontract and that any action taken by plaintiff was merely to minimize damages and the Court finds the same to be a fact. The Court further finds that no offer was thereupon or thereafter made by either said Duque & Frazzini or said Glens Falls to so perform, nor did either of them request plaintiff to desist from continuing the completion of said work in order to minimize damages until said defendant, Glens Falls, chose to take over further performance.

## XXVII.

The Court finds that each and every allegation set forth in the fourth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true. It is true plaintiff carried all the men who performed the subcontract work [491] on its own payroll, named itself as em-

ployer of the men who performed the subcontract work in all income tax withholding, social security and unemployment insurance returns, Workmen's Compensation and Public and Property liability policies on the work being performed by Duque & Frazzini, but the Court finds, in this respect, that arrangements were made therefor within the subcontract for the benefit of Duque & Frazzini which said benefit inured to defendant, Glens Falls and were not in violation of said subcontract.

### XXVIII.

The Court finds that each and every allegation set forth in the fifth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

### XXIX.

The Court finds that each and every allegation set forth in the sixth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true. It is true said subcontractor did not commence producing material on or before the 19th day of February, 1945, but did commence operation prior thereto in connection with the installation of their plant necessary for producing material under said subcontract.

The Court finds that while it is true that some payments were made by plaintiff for the account of said Duque & Frazzini for labor, material and

the like, before actual payments were due to the subcontractor, these were merely in the form of bookkeeping entries showing charges and advances made for the benefit of said subcontractor.

### XXX.

The Court finds that each and every allegation set forth in the seventh and separate affirmative defense of the First [492] Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true. The Court finds that any excess payment made by plaintiff over the progress payment, after the abandonment of said subcontract work by Duque & Frazzini on June 8, 1945, or any supervision or direction of production of materials by plaintiff following said abandonment was because of the abandonment of said work and the failure of defendant, Glens Falls to take over the completion thereof as hereinabove specifically found.

### XXXI.

The Court finds that each and every allegation set forth in the eighth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

### XXXII.

The Court finds that each and every allegation set forth in the ninth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

## XXXIII.

The Court finds that although defendant, Glens Falls, was fully advised by plaintiff and also through investigations made by its duly authorized representatives, of all payments made by plaintiff and manner of making same and amount thereof for the benefit of said Duque & Frazzini and of the amounts earned under said subcontract, as hereinabove found, and although it was also fully advised of all defaults on the part of said Duque & Frazzini known to said plaintiff, although it was advised of the abandonment of said subcontract by Duque & Frazzini and of the action of plaintiff in completing said subcontract as hereinabove found, defendant, Glens Falls, at no time, advised plaintiff that it, said plaintiff, had no authority or right to do any of said acts [493] or that on account thereof, defendant, Glens Falls intended to or would disavow any liability under said subcontract bond. The Court finds that by reason of the conduct and acts of said defendant, Glens Falls, as hereinabove found, and all of the facts and circumstances as disclosed by the evidence, defendant Glens Falls, the surety, waived its right to plead or assert any alleged failure on the part of plaintiff to comply with any of the condition precedent set forth in said subcontract bond as alleged in its First Amended Answer and the separate and affirmative defenses therein contained.

XXXIX.

The Court finds that for the same reason said defendant waived its right to plead or assert any failure on the part of plaintiff to comply with any of said condition precedent contained in said sub-contract bond as found in said Finding XXXIII, it also is estopped from asserting or pleading any such right as against plaintiff.

Conclusions of Law

As conclusions of law from the foregoing Findings of Fact, the Court concludes:

I.

That plaintiff, Basich Brothers Construction Company, a corporation, is entitled to have and recover of and from the defendant, Glens Falls Indemnity Company, a corporation, the sum of Seventy-nine Thousand Five Hundred Eighty-two and 91/100 Dollars (\$79,582.91), together with interest on \$29,866.39 of said amount at the rate of seven per cent per annum from June 8, 1945, to the date of rendition of judgment herein and interest on \$49,716.52 of said amount at the rate of seven per cent per annum from September 25, 1945, to the date of rendition of judgment [494] herein, together with its costs of suit incurred herein.

Let Judgment be entered accordingly.

Done in Open Court this 7th day of March, 1947.

/s/ LEON R. YANKWICH,

Judge.

Approved as to form as provided in Local Rule 7(a).  
.....

[Endorsed]: Filed March 10, 1947. [495]

In the District Court of the United States, Southern  
District of California, Central Division

No. Civ. 5021—Y

BASICH BROTHERS CONSTRUCTION COM-  
PANY, a corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a  
corporation, and ANDREW DUQUE and  
CARSON FRAZZINI, co-partners, doing busi-  
ness under the name of DUQUE & FRAZZINI,  
Defendants.

### JUDGMENT

The above entitled action came on regularly for trial in the District Court of the United States, Southern District of California, Central Division, before the Honorable Leon R. Yankwich, Judge presiding, on the 25th day of November, 1946, and thereupon regularly continued for further proceedings which were had on the 4th day and 5th day of February, 1947, Stephen Monteleone, Esq., and Tracy J. Priest, Esq., appearing as attorneys for Basich Brothers Construction Company, a corporation, and John E. McCall, Esq., appearing as attorney for the defendant, Glens Falls Indemnity Company, a corporation; (defendants Andrew Duque and Carson Frazzini, co-partners, doing

business under the name of Duque & Frazzini, not having been served with summons and not having appeared, the trial proceeded against the defendant, Glens Falls Indemnity Company, a corporation, alone.)

A jury trial having been duly waived by the respective parties, the cause was tried before the Court without a jury, whereupon, evidence, both oral and documentary, was introduced by and on behalf of said plaintiff Basich Brothers Construction Company, a corporation, and said defendant, Glens Falls Indemnity Company, a corporation, respectively, being fully advised in the premises, the Court having made, signed and filed herein Decision and Order for Judgment and Findings and also its Findings of Fact and Conclusions of Law:

Now, Therefore, It Is Ordered, Adjudged and Decreed that plaintiff herein, Basich Brothers Construction Company, a corporation, have and recover of and from defendant herein, Glens Falls Indemnity Company, a corporation, the sum of Seventy-nine Thousand Five Hundred Eighty-two and 91/100 Dollars (\$79,582.91), together with interest on \$29,866.39 of said principal amount from June 8, 1945, and interest on \$49,716.52 of said principal amount from September 25, 1945, to and including February 28, 1947, said interest amounting in the

sum of \$8557.49, together with plaintiff's costs of suit herein incurred in the sum of \$216.80.

Done in Open Court this 7th day of March, 1947.

LEON R. YANKWICH,  
Judge.

Approved as to form as provided in Local Rule 7(a).

-----  
Judgment entered March 10, 1947. Docketed March 10, 1947, C. O. Book 42, Page 115.

EDMUND L. SMITH, Clerk,  
By /s/ E. N. FRANKENBERGER,  
Deputy. [497]

Memorandum of Amount of Interest on *of* After  
March 1, 1947, until rendition of Judgment

The daily interest on the total principal of the Judgment in the amount of \$79,582.91 is \$15.26 a day. [498]

Received copy of the within Judgment this 27th day of February, 1947, at one o'clock p.m.

/s/ JOHN E. McCALL,  
Attorney for Defendant  
Glens Falls Indemnity  
Company.

[Endorsed]: Filed March 10, 1947. [499]



[Title of District Court and Cause.]

NOTICE OF APPEAL

To Edmund L. Smith, Clerk of Said Court, to the Plaintiff Above Named, and to Stephen Monteleone, Esq., and Tracy J. Priest, Esq., Its Attorneys:

Notice Is Hereby Given that defendant Glens Falls Indemnity Company, a corporation, hereby appeals to the Circuit Court [500] of Appeals for the Ninth Circuit from the final judgment entered in this action in Civil Order Book 42 at Page 115, on the 10th day of March, 1947, and from the whole thereof.

Dated this the 15th day of May, 1947.

/s/ JOHN E. McCALL,

Attorney for Appellant and Defendant Glens Falls Indemnity Company, a corporation.

[Endorsed]: Filed and mailed copy to Stephen Monteleone, Attorney for Plaintiff, May 16, 1947.

---

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

To Edmund L. Smith, Clerk of Said Court, to the Plaintiff Above Named, and to Stephen Monteleone, Esq., and Tracy Priest, Esq., Its Attorneys:

Appellant Glens Falls Indemnity Company, a corporation, one of the defendants above named, intends to rely in its appeal from the whole of the final judgment given, made and entered in the above-entitled action, upon the following points:

1. The trial court erred in finding that appellee complied with all the conditions precedent contained in the bond.

2. The trial court erred in finding that appellee gave to appellant notice of default on the part of the subcontractor, in the manner and within the time required by the terms of the bond.

3. The trial court erred in finding that the subcontractor commenced work as required in the subcontract.

4. The trial court erred in finding that appellee's letter of April 5, 1945, constituted notice of default as required by the terms of the bond.

5. The trial court erred in finding that appellee complied with the condition precedent of the bond that appellant have the right within thirty days after receipt of notice, to proceed or procure others to proceed with the performance of the subcontract.

6. The trial court erred in finding that the completion of the subcontract work by appellee after June 8, 1945, was merely to minimize damages.

7. The trial court erred in finding that appellee has performed every act on its part to be performed under the terms of the subcontract.

8. The trial court erred in finding that appellee retained the last payment payable and all reserves and deferred payments retainable under the terms of the subcontract.

9. The trial court erred in finding that appellee did not conceal from appellant the fact that the subcontractor was in default at the time the bond was accepted.

10. The trial court erred in finding that the subcontract was not altered without the knowledge and consent of appellant. [503]

11. The trial court erred in finding that appellee did not pay to or for the account of the subcontractor in excess of ninety per cent of engineers estimate and ninety per cent of useable materials in stockpile.

12. The trial court erred in finding that appellee did not pay to or for the account of the subcontractor sums in excess of the amount due under the subcontract.

13. The trial court erred in finding that appellee did not take over and control and supervise the subcontract work.

14. The trial court erred in finding that the payments made by appellee were in accordance with provisions of the subcontract.

15. The trial court erred in finding that the carrying by appellee on its own employee rolls and naming itself as employer of the men who performed the subcontract work was within the terms of the subcontract.

16. The trial court erred in finding that appellee did not make premature payments to or for the account of the subcontractor.

17. The trial court erred in finding that appellee did not make payments to the subcontractor on account of the subcontract work before any payment was due under the terms of the subcontract.

18. The trial court erred in finding that payments made by appellee for the account of the subcontractor, before actual payments were due, were merely bookkeeping entries.

19. The trial court erred in finding that the payments made by appellee to or for the account of the subcontractor inured to the benefit of appellant.

20. The trial court erred in finding that appellee did not waive any of its rights, nor elect to perform, nor perform any act inconsistent with the conditions of the bond. [504]

21. The trial court erred in finding that appellant waived compliance by appellee with conditions precedent in the bond.

22. The trial court erred in finding that appellant had knowledge of the manner or amount of payments made by appellee.

23. The trial court erred in finding that appellant was fully advised of all defaults on the part of the subcontractor known to appellee.

24. The trial court erred in finding that the representative of appellant had access to or ex-

amined appellee's payrolls and books during the period payments were being made to or for the account of the subcontractor.

25. The trial court erred in finding that appellant is estopped from asserting the failure of appellee to perform the conditions precedent contained in the bond.

26. The trial court erred in finding that the conduct of appellant lulled appellee into a feeling of security.

27. The trial court erred in finding that the complaint states a claim upon which relief can be granted.

28. The trial court erred in finding that the evidence establishes a claim upon which relief can be granted.

29. The trial court erred in finding that the bond, by the terms thereof, bound appellant for the faithful performance of the work to be done under the terms of the subcontract, Plaintiff's Exhibit "1".

30. The trial court erred in finding that the provisions of the subcontract constitute obligations of appellant.

31. The trial court erred in finding that it was the intention of the parties that the provisions of the subcontract were obligations of appellant. [505]

32. The trial court erred in finding that the subcontractor certified to weekly payrolls paid by appellee.

33. The trial court erred in finding that all of the items set forth in the bill of particulars as amended and corrected, were used in the performance of the subcontract.

34. The trial court erred in finding that the amounts set forth in the bill of particulars as amended and corrected, were reasonable and fair.

35. The trial court erred in finding that the amounts set forth in the bill of particulars as amended and corrected, represents the actual cost to appellee of completing the subcontract work after June 8, 1945.

36. The trial court erred in finding that appellant was indebted to appellee on June 8, 1945.

37. The trial court erred in finding that appellant is indebted to appellee for money expended after June 8, 1945, on account of any default on the part of the subcontractor.

38. The trial court erred in finding that appellant is indebted to appellee for interest prior to date of judgment.

39. The trial court erred in concluding that appellee is entitled to judgment against appellant.

40. The trial court erred in concluding that appellee is entitled to judgment against appellant for interest.

41. The evidence does not support or sustain the findings of fact and conclusions of law as aforesaid.

42. The trial court erred in decreeing that appellee is entitled to judgment against appellant.

43. The trial court erred in decreeing that appellee is entitled to judgment against appellant for interest.

44. The trial court erred in permitting witness George J. Popovich to testify from a summary of purported documents not in court and available to counsel for cross-examination. [506]

45. The trial court erred in permitting witness George J. Popovich to testify from a summary of purported documents not shown to be admissible in evidence.

JOHN E. McCALL,

Attorney for Appellant and Defendant Glens Falls  
Indemnity Company, a Corporation.

Service of a copy of the foregoing Statement of Points on Which Appellant Intends to Rely acknowledged this 15th day of May, 1947.

STEPHEN MONTELEONE,

Attorneys for Plaintiff and  
Appellee.

[Endorsed]: Filed May 16, 1947. [507]

---

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the plaintiff and appellee Basich Brothers Construction Company, a corporation, and defendant and appellant Glens Falls Indemnity Company, a corporation, in the above-entitled action, by and through their respective attorneys of record, that the origi-

nal exhibits in the above-entitled [508] action may be transmitted to the Circuit Court of Appeals for the Ninth Circuit for use in printing the record on appeal, in lieu of copies.

Dated this 8th day of May, 1947.

STEPHEN MONTELEONE,  
Attorney for Plaintiff and  
Appellee.

JOHN E. McCALL,  
Attorney for Appellant and Defendant Glens Falls  
Indemnity Company, a Corporation.

It is so ordered this 15th day of May, 1947.

PAUL J. McCORMICK,  
U. S. District Judge.

[Endorsed]: Filed May 16, 1947. [509]

---

[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 516 contain full, true, and correct copies of Complaint for Recovery of Money and on Bond; Bill of Particulars; Notice to Produce; Request for Admission Under Rule 36; Stipulation filed Sept. 9, 1946; First Amended Answer of Defendant Glens Falls Indemnity Company; Amendments to Bill of Particulars; Stipulation (unsigned by counsel for plaintiff) filed Octo-





In the District Court of the United States in and  
for the Southern District of California, Cen-  
tral Division

Honorable Peirson M. Hall, Judge Presiding.

No. 5021-PH Civil

BASICH BROTHERS CONSTRUCTION COM-  
PANY, a Corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a  
Corporation, and ANDREW DUQUE and  
CARSON FRAZZINI, co-partners doing busi-  
ness under the name of DUQUE & FRAZZINI,  
Defendants.

REPORTER'S TRANSCRIPT OF  
PRETRIAL HEARING

Appearances:

For the Plaintiff Stephen Monteleone, Esq., 1049  
Petroleum Building, Los Angeles 15, California.

For the Defendant Glens Falls Indemnity Com-  
pany: John E. McCall, Esq., 458 South Spring  
Street, Los Angeles 13, California.

Los Angeles, California, July 8, 1946

2:50 o'Clock p.m.

(In chambers.)

The Court: Very well. I have your statement of issues involved. I do not know what more can be settled by a pre-trial conference here. What do you think?

Mr. Monteleone: I don't know what can be settled. The facts are very simple, as a matter of fact.

The Court: Have you exchanged all your exhibits?

Mr. Monteleone: We have. As a matter of fact, we are both using the same exhibits. Practically every one of Mr. McCall's exhibits are the ones that I presented to the Court.

Mr. McCall: No, we never did get those contracts, your Honor. That is one thing that I wanted to bring up here. We gave notice, the file will show, to produce. If your Honor has the bill of particulars there you will notice, on Schedule 6, the last part, page 2, it says: "Insurance includes compensation, public liability, property damage, California unemployment, Federal old age and Federal excise." Those are the documents we have asked for the production of.

When we came up here the last time counsel for the plaintiff suggested that in lieu of bringing those documents here that he would stipulate that they were all carried in the name of the plaintiff as the

employer of these men instead of being carried as the subcontractor's employees. When we got up here the other day I had drawn up a proposed stipulation which counsel for the plaintiff suggested that he take back and show to his client, the plaintiff. He took it back and he showed it evidently and then he refused to sign it.

Mr. Monteleone: No. Let me correct that, Mr. McCall.

I explained to your associate, when he came to the office, that I would stipulate that all of those documents were carried in the name of Basich Brothers Construction Company as the employers. I asked counsel to add to that stipulation a qualification that by so stipulating we do not concede that Basich Brothers were, in fact or in law, the actual employers.

In other words, they were carried as a matter of convenience to save the expense of the subcontractor. That is a customary practice among contractors, to carry their subcontractor's employees under their workmen's compensation.

I am willing to stipulate, and I so stipulate now, that all of those records designated in the stipulation prepared by Mr. McCall indicate Basich Brothers as the employers. However, we want the privilege of explaining to the Court during the trial how it happened that Basich Brothers appears as the employers.

The Court: Do you have the contracts?

Mr. Monteleone: Yes, I have the contract. The contract gives Basich Brothers the right to do that.

The Court: What you are asking for is the contract, isn't that so?

Mr. McCall: That is right.

Mr. Monteleone: You have the contract.

Mr. McCall: The contracts of insurance?

The Court: Yes.

Mr. McCall: Compensation, and so forth. That is what we wanted produced so that we can introduce it here in evidence.

Mr. Monteleone: It will be produced. I didn't know that. I thought you merely wanted—I will stipulate that Basich Brothers appears as the employers in connection with these documents. I will so stipulate now.

Mr. McCall: But there are other matters that counsel wants to put in there which is matters of defense only, and if we are going to go into that stipulation we would be setting aside all the case that we have in connection with that particular point.

The Court: What I understand is that counsel is willing to stipulate that the documents read as they read.

Mr. Monteleone: That is correct.

The Court: Without waiving any right to any defense he might have.

Mr. Monteleone: That is correct, if your Honor please.

Mr. McCall: That is okay. He doesn't need that, of course. Anyone knows that he would not be waiving any right.

Now I have changed that and wrote in here in this shape a request for admission under Rule 36. While counsel is looking that over, that is the same thing exactly except it is just an admission and I don't know how other lawyers would handle it, but I do get the State court and Federal court mixed up if I do not follow the rule on that particular matter.

So if counsel would just acknowledge receipt of the original, I will file it, and then you can have all the time you want to put in your answer, because it has to be filed later on.

Mr. Monteleone: In other words, we can't change the wording of the documents. I do not know if your Honor has read the subcontract or not.

The Court: No, I haven't. I do not read these things until I have to.

Mr. Monteleone: It provides that is the subcontractor does not provide workmen's compensation, public liability, and so forth, then the general contractor has the right to do so and charge the premium against the subcontractor. When the subcontractor failed to procure workmen's compensation, public liability and property damage insurance, under the subcontract, which is a part of

the bond of the defendant, we paid for those different policies and we are charging the subcontractor with the same money under that provision of the contract.

The Court: Do you want to acknowledge receipt of that?

Mr. McCall: I would like to say one thing on that, since counsel has that point before the Court. He is absolutely correct about what the contract says, that if the subcontractor does not pay these items the general contractor can do it and charge it to him and take it out of any money he may owe him. But in this case all the evidence shows that these documents we are asking for that the general contractor was the subcontractor, the general contractor and everything. He carried all the insurance, all the compensation, paid the compensation, and all that.

The Court: That is what your position is?

Mr. McCall: That is right.

The Court: All right. Then those documents will be produced?

Mr. Monteleone: They will be produced in court.

The Court: Will you need them in advance?

Mr. McCall: We certainly do need them in advance to prepare our case.

Mr. Monteleone: All right.

Mr. McCall: If we can get this information back that we have asked for——

Mr. Monteleone: If you want to save time and not encumber the record, I will stipulate that what you set forth in your request for admissions is true.

We admit those. But we want the privilege of explaining it in court.

The Court: Reserving your defense?

Mr. Monteleone: That is correct.

Mr. McCall: That is right.

The Court: You still want to look at the documents, do you?

Mr. McCall: We would like to look at the documents but we don't have to have them now, or in any big hurry.

The Court: When do you have to have them. This case has not been set for trial.

Mr. McCall: No, it hasn't.

Mr. Monteleone: May we go to trial on the 16th of July?

The Court: I am afraid we cannot do that now because next Monday, the 15th, I have a three-judge case set. I do not know how long it is going to take. The parties want to take oral testimony.

Mr. Monteleone: We have this situation: There are a great many cases pending in Arizona involving this same bond, the same subcontract, in which the defendant Glens Falls has been named on a third-party complaint, and we were trying to avoid going to Arizona. We made three trips there already and it is pretty tiring and is quite an expensive proposition. It involves the same issues as is presented in this case here. Now we can't stall those Arizona cases.

The Court: Are they in Federal Court?

Mr. Monteleone: They are in Federal Court.

The Court: In Judge Ling's court?

Mr. Monteleone: Some are in Judge Ling's court and some are in Tucson.



The Court: Judge Ling is here. I thought maybe you could transfer this case to him here, but I do not know whether he can take it or not.

Mr. McCall: We are offering to do anything, just to get this case over, except to pay the \$100,000.

Mr. Monteleone: Why object to going to trial on the 16th of July before Judge Hall then?

The Court: I cannot try it on the 16th. I cannot give you any assurance that I can. I might be able to try it. I do not know what will happen on the three-judge hearing.

Mr. Monteleone: We will go to any court to have this matter determined.

The Court: Judge Ling is the other District Judge designated with me on this hearing, so he will be tied up on that.

Mr. Monteleone: Suppose we hold it open and come up here on the 16th?

The Court: You do not have many witnesses?

Mr. Monteleone: No.

Mr. McCall: That is another point, your Honor. We have had a lot of uphill sledding. The notice sent out by your Honor called for the names and addresses of witnesses and they didn't put in any of the addresses of their witnesses, and we can't find them to take their depositions, and we want some of those depositions.

Mr. Monteleone: What depositions do you want? You have Mr. Basich's deposition. He is the only one. The others are nothing but bookkeepers and accountants who prepared the bill of particulars, aside from Mr. Kovich. Mr. Kovich was Mr.

Basich's superintendent, and all he knows is what Basich knew, and you have Basich's deposition. You took half a day in taking his deposition.

Mr. McCall: Some of the information Mr. Basich gave us makes us know that we must have Mr. Kovich's deposition, and Mr. Popovich's.

Is it Mr. Popovich that drew the subcontract?

Mr. Monteleone: No, Mr. Popovich is the book-keeper.

Mr. McCall: Who drew up the subcontract?

Mr. Monteleone: I don't know.

Mr. McCall: That is what Basich said.

The Court: How are you going to take their depositions before next Tuesday if you should go to trial next Tuesday?

Mr. McCall: We couldn't do it, your Honor. If we go to trial next Tuesday it would take three weeks to take testimony on this bill of particulars. In other words, if we have a little time we can work this out together and we can save a week or two. The case should not take over three or four days to try.

Mr. Monteleone: We went to Tucson to try the issues involved in this matter, we dragged out witnesses up there, and Mr. McCall went there and they raised some technical objection when we were about to go to trial, after we were in Tucson to try these various issues. This was about four or five months ago. The same issues were raised under third-party complaints filed in these actions, and we were before Judge Sames, who was to hear the matter before he retired. We went three days there

and then these objections were made. They were nothing more nor less than mere technical objections, but Judge Sames sustained the objection with the privilege of amending by interlineation, but they were not ready to go to trial because they raised the objection. It has been nearly a year and a half that we have been battling with the insurance company over these claims here. Mr. McCall can't say that he is unprepared.

The Court: He doesn't say he is unprepared, but he says it will save a lot of the Court's time to take depositions.

Mr. Monteleone: What depositions? There are no depositions, your Honor please, except the man who is Basich Brothers' superintendent on the job, and he is going to be a witness here. He is called as a witness and he will testify.

Mr. McCall: Counsel just drove me into making this statement. He says on account of technical objections I raised over there we said we weren't ready for trial. We tried that case. Judgment went against his client.

Mr. Monteleone: Not on the third-party complaint.

Mr. McCall: I am only defending on the third-party complaint and the Court held that the third-party complaint failed to state a cause of action, and on motion of the plaintiff's attorney he granted them leave to amend, and they did amend. I don't think that is a technical objection. We tried the case already.

The Court: That is beside the issue here.

Mr. Monteleone: There is no deposition that he has in mind except Mr. Kovich, who will be a witness and will testify at the trial. He was the superintendent of Basich Brothers on the job. We are anxious to have this matter determined because it involves so many other matters.

Mr. McCall: I would like to illustrate, if I might, one point which shows the fact that we are not prepared, that is, we do not have our case prepared, to save the time of the Court and counsel and expenses and that I have diligently sought for information.

On the 7th of June a letter was addressed to the plaintiff and his attorney in which I asked this question:

“The third paragraph of your letter of May 23rd, 1945, states that said subcontractors did not commence work within the time specified in said contract, but you did not state when the subcontractors did commence work on said contract. We would like to have this information, together with any and all other information you may be able to give us concerning matters which in your opinion amount to a default on the part of said subcontractors. The subcontractors deny that they are in default in any way whatever.”

On the 11th of June I received this statement from the attorney for the plaintiff:

“\* \* \* For the information of yourself and your client we have no direct knowledge when

the work commenced but that Basich Brothers had no reason to believe that Duque & Frazzini had not sufficient workmen and equipment to insure the completion of said work as the contract provided until the early part of April 1945.”

Now in taking the deposition—I just bring that out as one illustration—in taking that deposition all that came out clear. Mr. Basich said just exactly when they started work. That is, all the information that I couldn’t get there I got from him.

We were talking about these insurance policies. Here are thousands and thousands of dollars paid for insurance. We do not know the insurance company. We have no way of finding that out.

The Court: When can you have those available?

Mr. Monteleone: I will have those available tomorrow.

The Court: All right.

Mr. McCall: Fine. That helps us then.

The Court: On your request, the plaintiff will be ordered——

Mr. Monteleone: You are talking about workmen’s compensation?

Mr. McCall: All the insurance policies.

The Court: They will be made available for counsel’s inspection at your office tomorrow?

Mr. Monteleone: Yes.

Mr. McCall: That is fine.

Mr. Monteleone: Your Honor will find a letter written to the defendant over a year ago in which they were given the privilege of examining all the

letters at the office of Basich Brothers regardless. That offer was never accepted by them.

The Court: You say you want to take depositions?

Mr. McCall: I would like to take some of those depositions, yes, sir, and one leads to another. I know I want to take the deposition of George Kovich. He was the general superintendent on the job from start to finish. I do not know his present address, however.

The Court: Will you stipulate to his deposition?

Mr. Monteleone: I will stipulate to it.

The Court: When?

Mr. Monteleone: He is in Fresno, and we will have to reach him. We will have him here this week.

The Court: During the week?

Mr. McCall: Any time that I am not in trial.

Mr. Monteleone: How about Friday?

Mr. McCall: Friday the 12th?

Mr. Monteleone: Yes.

Mr. McCall: 2:00 o'clock?

Mr. Monteleone: 2:00 o'clock.

Mr. McCall: Of course you will have to find out if you can reach him.

Mr. Monteleone: We will make the effort to get him.

The Court: All right. That is stipulated to. Deposition at 2:00 o'clock Friday of this week, July 12th.

What other depositions do you want to take?

Mr. McCall: I called Carson Frazzini. He is

the subcontractor. We have no assistance from anybody. We just have to gouge out the information as best we can.

Mr. Monteleone: We have no assistance either, Mr. McCall.

Mr. McCall: So I finally got Mr. Carson Frazzini today in Reno, and he said that he would give us his deposition if we would come to Reno to take it, and Mr. Monteleone has already stated that he will send Mr. Goodman or someone else there to take that deposition in his behalf.

Mr. Monteleone: I will arrange for somebody to take it.

The Court: What other depositions do you want?

Mr. McCall: You have the names there.

The Court: Nick L. Basich, Harold Slonaker, Bart Woolums, Paul Albino, Homer Mitchell, George Kovich, George Popovich, Homer S. Thompson.

Mr. McCall: Popovich, I want to take his deposition, I am quite sure, but I will not know for sure until I finish with Mr. Kovich.

Mr. Monteleone: For your information, Mr. McCall, Popovich is the office manager. Probably you want to know who prepared this subcontract.

Mr. McCall: Yes.

Mr. Monteleone: He undoubtedly prepared the subcontract from a regular form as a clerk does, if your Honor please, and from Basich's testimony we will stipulate that the contract was drafted, that is, the mechanical part was drafted, by Mr. Popovich.

The Court: Do you still want his deposition?

Mr. McCall: I am not sure, your Honor.

Mr. Monteleone: That is a fact. I have already talked to him.

Mr. McCall: Those depositions I would not let hold up my case though.

The Court: Obviously I cannot give you any definite trial date for next week. I am set up now until the last week in September, September 24th.

Mr. Monteleone: That will be fine.

Mr. McCall: September 24th suits me fine, except that I have to be at the State Bar then. I have all of my dates set down through Saturday.

The Court: Then you won't be there?

Mr. McCall: Hardly.

The Court: I will set it for trial on that date, and if you have any depositions that you want to get out of the way, get them out of the way or else by notice sufficient in advance during this month because I will not be here in August.

Mr. McCall: We can stipulate as to all depositions.

The Court: Very well.

Are these issues sufficiently framed here so that there isn't any quarrel about them? I notice you are complaining about the default. Has that been specified sufficiently to put the matter in issue?

Mr. McCall: It was my impression that it had. Now the rule is to the effect that the plaintiff may allege generally, but the answer must state specifically. I have several special defenses there and I take it that the special defenses are a part of the answer, is that not true?



The Court: Yes, that is correct.

Mr. McCall: In other words, because I don't put it in my answer, if I have it in my special defenses, that is all right.

The Court: That is part of the answer, but what I was getting at is the matter of an issue when I come to decide it here. The first thing is whether or not there is a default.

Mr. McCall: That is right.

The Court: And the second thing is when it occurred and what it was.

Mr. McCall: And did they give notice of it.

Mr. Monteleone: Here is a question. I don't know whether it is a matter of pleading or not. Where the default is raised in the answer can we introduce evidence on it. We don't contend that there was any default but in the event that there was we contend that the insurance company waived any requirement of notice because they contend that the default took place. They were notified on April 5th.

The Court: Do you contend that there was a default?

Mr. Monteleone: No, there wasn't. We don't concede that there was, but I say that in the event——

The Court: How are they liable if there is no default?

Mr. Monteleone: How is who liable?

The Court: How is the defendant bonding company liable if there was no default?

Mr. Monteleone: There was a default later on. I mean, what the bonding company claims is when the default took place we had not notified them and the sub-contractor continued with the work until June.

The Court: At which time there was a default?

Mr. Monteleone: Not only a default but an abandonment of the work.

The Court: That is the default upon which you rely?

Mr. Monteleone: That is the default; yes.

The Court: In answer to their question that there was no notice, you claim that they already knew about it?

Mr. Monteleone: We claim that they already knew about it, but they recognized the policy and they permitted us to continue with the understanding that this bond was still a faithful performance bond.

The Court: I just wanted to know if the issue was framed as between the parties.

Mr. McCall: On whose understanding was it that this bond was faithful performance for anything? Whose understanding did you have at that time? We did not know until just then, your Honor, when they claim that there was a default. That is what we have been trying to find out. Now as I understand it, counsel for the plaintiff says they are not claiming that there was any default until the abandonment of the job, which was on or about June 8, 1945. Is that correct?

Mr. Monteleone: The default on the part of the subcontractor?

Mr. McCall: Yes.

Mr. Monteleone: Yes. We have been trying to work out with the bonding company to put in additional equipment to produce sufficient material, at lease where the Government was ready to step in and take the whole job away from the prime contractor. Your Honor hasn't read these letters and the information given in them so that you are not familiar with what transpired for a matter of months before the subcontractor abandoned the work. As a matter of fact, the bonding company representative and Basich Brothers made—how many trips?—three trips to Arizona in the meanwhile.

Mr. McCall: I think you and I went with them every time they went over there.

Mr. Monteleone: No, we didn't.

I don't know whether your Honor understands it or not, but we are not suing for damages which resulted by reason of any delay in the operation. We are not asking that at all. That is what was involved in that Lang Transportation Company case. We are not asking for damages. We are delayed and we could have made a claim for damages. But all we are asking for is the money which was actually paid by Basich Brothers to cover the payroll and equipment and material which was acquired by the subcontractor in performing their subcontract over and above the amount that was earned by the

I was under the impression that you gentlemen would agree either as to the many items in the bill of particulars as to each one or as to each class. I understand that they can be divided into classes at least concerning dates of demand or dates of payment.

Mr. McCall: On that point, may it please the Court, we still have a few exhibits that we would like to hand in, and on the points of the items in the bill of particulars I have written a letter to plaintiff's counsel——

The Court: Have you stipulated or not?

Mr. McCall: No, we have not.

The Court: The matter is off calendar.

Mr. Monteleone: If the Court please, I will concede everything that Mr. McCall has raised.

The Court: I think the great difficulty here is to know just what Mr. McCall is raising.

Mr. Monteleone: I don't know. I have agreed to whatever he has agreed to, and I will stipulate that he may introduce the exhibits he called to my attention.

The Court: Let us reduce the stipulation to writing.

Mr. Monteleone: I am willing to agree to any of these items.

The Court: The matter is off calendar. You gentlemen get some stipulation in writing as to those various amounts.

Mr. Monteleone: It is not due to the fault of plaintiff, and we should not be penalized in connection with the matter.

The Court: I could not try the case anyway, Mr. Monteleone.

Mr. Monteleone: I understand that, if the Court please, but it is apparent that it has been the purpose of the defendant to stall this matter as long as possible because we are in a very serious situation now, confronted with a great many litigations pending, and apparently the defendant assumes that the plaintiff may have to make certain concessions that he otherwise would not if we go to trial. There are just a few little items involving less than \$50 or \$60, that we are willing to discount and throw off from the bill of particulars. The exhibits that Mr. McCall desires to introduce in evidence I will stipulate they may be introduced in evidence.

Mr. McCall: May we introduce those at this time, your Honor?

Mr. Monteleone: I have no objection to that.

The Court: I guess you can.

Mr. McCall: The first exhibit on the part of the defendant here is a contract dated May 3rd—

Mr. Monteleone: You mean a letter.

Mr. McCall: It is a letter.

The Court: A writing. Let us say it is a writing, then nobody will be committed as to whether it is a letter of contract or an agreement.

Mr. McCall: As I call these off shall I hand them to the Clerk?

Have you seen them, Mr. Monteleone?

Mr. Monteleone: Yes, I have seen them. Are they the ones you refer to in the deposition?

Mr. McCall: Yes.

Mr. Monteleone: No objection.

Mr. McCall: Here is one dated May 1st.

Mr. Monteleone: No objection.

Mr. McCall: Then Mr. Monteleone has the recap of the estimates which we would like to put in as a defendant's exhibit.

Mr. Monteleone: No objection.

Mr. McCall: Then the statement of money paid prior to March 7, 1945, a copy of which was left in counsel's office.

Mr. Monteleone: No objection.

Mr. McCall: And the note and letter to the attorney, and the transcript before Judge Harrison. That is already in.

The Court: Do you offer that in evidence in this court?

Mr. McCall: I just want it before the court.

The Court: Do you offer it in evidence?

Mr. Monteleone: We will offer it on behalf of the plaintiff.

The Court: All right. It is in evidence.

What about the exhibits you offered there and withdrew? Do you re-offer them?

Mr. McCall: I did not withdraw these, your Honor.

The Court: They were withdrawn, according to the transcript.

Mr. Monteleone: We will offer them on behalf

of the plaintiff, the same as indicated in the transcript.

The Court: You re-offer them?

Mr. Monteleone: Yes, your Honor.

Mr. McCall: Yes, your Honor. I thought they had already been offered.

The Court: These are admitted in evidence to be serially numbered.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 1 to 19 inclusive respectively.)

[Plaintiff's Exhibits are set out in full following Reporter's Transcript—See Index for Page Number.]

Mr. McCall: Then we have a stipulation here regarding the insurance policies which is already in evidence but for some reason the stipulation was not left with the reporter.

The Court: File it with the Clerk.

Mr. Monteleone: I think that we agreed at the pretrial to all of these matters, if the Court please.

The Court: File it with the Clerk.

(The document referred to was received in evidence and marked Defendant's Exhibits A, B, C and D.)

[Defendant's Exhibits A, B, C, D, are set out in full following Reporter's Transcript—See Index for Page Number.]

Mr. McCall: Then there were certain insurance policies mentioned in here. This Court at a pre-trial hearing made an order in chambers that the

policies be exhibited to me as counsel for the defendant on the next day.

The Court: Are they in evidence?

Mr. McCall: No, they are not. They have never been exhibited to me. I sent my auditor out to look at them, they were to be shown to him, and he asked defendant's counsel, according to his report to me, several times but those policies have never yet been exhibited to the defendants.

Mr. Monteleone: Mr. McCall had an auditor spend about three weeks at the office of the plaintiff at Alhambra, if the Court please. These documents were all exhibited to the auditor, and it merely refers to the matters contained——

The Court: Mr. Monteleone, are the insurance policies material in this case?

Mr. Monteleone: Not at all.

The Court: Do you maintain that they are material?

Mr. McCall: Yes.

The Court: Do you now make a demand on the other side to produce these policies?

Mr. McCall: Yes, I do.

The Court: Do you want the policies?

Mr. McCall: Yes, your Honor.

Mr. Monteleone: They will be offered.

The Court: Do you want to offer them in evidence?

Mr. McCall: Yes.

Mr. Monteleone: They will be produced and offered in evidence, if the Court please.

Mr. McCall: Your Honor, the plaintiff's com-



plaint refers to the prime contract between Basich Brothers Construction Company and the United States Government and it alleges that it is not attached to the complaint because it was too bulky. I would like for the plaintiff to bring in that part of the contract.

The Court: Why cannot he bring it all in?

Mr. Monteleone: If the Court please, Mr. McCall had that in his office last week and he made a copy of whatever portion he desired. It is the only one we have and I would like to keep it.

The Court: How am I to know what is in it?

Mr. Monteleone: We will have it introduced as an exhibit.

The Court: That will be plaintiff's next exhibit in order when it gets here.

Mr. Monteleone: All right.

Mr. McCall: We have requested the Government for a form and to accommodate counsel we will fill that in and stipulate that that is a copy of the part that we want to put in.

The Court: Form of what?

Mr. McCall: We have ordered it from the Government.

The Court: He is going to introduce the prime contract in evidence and produce it in court here.

Mr. McCall: He only has the one copy he says, your Honor, and if he needs it I don't want to work a hardship on him.

Mr. Monteleone: If we have to call on the Court for assistance to make a copy, we can do that later.

The Court: He will produce it and if you want to withdraw it you can put the forms in, or anything else that you like. But I will not know what is in the contract until I see it.

Mr. Monteleone: That will be introduced in evidence.

Mr. McCall: Now, your Honor, I am bound to answer plaintiff's charges that I have not cooperated in connection with the items in the bill of particulars. On October 8th I wrote him a letter in which I pointed out the reason we were not able to stipulate to items in there. Now may I hand this in as an exhibit for the defendant?

The Court: Are you offering that in evidence?

Mr. McCall: Yes, your Honor.

The Court: Do you have any objection?

Mr. Monteleone: No, if the Court please, except I want to explain these various items for the record.

The Court: Are you offering this letter as an exhibit or are you filing it as argument? I did not know lawyers could make evidence as they went along by writing a letter to the other lawyer after the suit had started.

Mr. McCall: It may be argument.

The Court: It will be filed in the records of the case but not as an exhibit.

Mr. Monteleone: May this document be filed as an answering explanation of those items?

The Court: It may be filed.

Mr. McCall: I do not have a copy of his answer.

The Court: You can copy it from the Clerk.

Mr. McCall: The reason of that, your Honor,

is that it will show the Court the way the bill of particulars is built up and that the items are such that counsel cannot possibly stipulate to them. I see no way that they can be determined except by trial, either before the Court or before a master.

The Court: Item by item?

Mr. McCall: Well, we have no proof of the items, your Honor. There was millions of dollars spent at this place.

The Court: Do either of you have any further exhibits or evidence to offer in the case at this time?

Mr. Monteleone: We have none, if the Court please.

Mr. McCall: None.

The Court: The matter will stand submitted, with this proviso, that upon examination of the files and records, when I get to it I may restore it to the calendar for some testimony.

Mr. McCall: It is understood that this evidence heretofore submitted by counsel for the plaintiff and the defendant is on the question of liability only, is that right?

The Court: I do not know what it is on. I did not hear it.

Mr. McCall: It was stipulated between counsel before that we would submit this evidence and then it would be submitted on briefs, and that was the original idea.

The Court: Have you filed your briefs?

Mr. Monteleone: I have, if the Court please.

Mr. McCall: I have not filed a brief, and his

brief is not designated as an opening brief. It is only designated as points and authorities, and I do not think it does his case justice, and I don't want to take the advantage of him. If he wants to denominate that as his opening brief, I shall certainly be glad to file a reply to it.

Mr. Monteleone: I will stand on what I file, if the Court please.

The Court: You do not desire to file any further briefs?

Mr. Monteleone: No, I am satisfied with the brief I have already filed.

Mr. McCall: Then may I file a reply brief?

The Court: How long will you want for your reply brief?

Mr. McCall: I would like to have 30 days.

The Court: I thought you were in a hurry to get this case decided. You can write a brief in 10 days.

Mr. McCall: I think I can.

The Court: You will have 10 days to file a reply brief and the plaintiff will have 5 days thereafter to reply.

Mr. Monteleone: That is sufficient.

The Court: Then after 15 days the matter will stand submitted.

Mr. McCall: On the question of liability?

The Court: I haven't seen it. Whatever you have here will be examined.

I want to suggest this, however, that if it is at all possible to try this lawsuit all at once, it is my

purpose and intention that it shall be tried rather than to determine a portion of it and then have an appeal taken on that to the Circuit Court of Appeals, and then come back and litigate over a bill of particulars which is three or four hundred pages long and involves thousands of items.

In other words, we are duty bound under the rules of civil procedure and under plain principles of justice to dispose of the whole matter as quickly as possible, so I shall examine whatever you have and whatever you have submitted with that idea in mind.

Mr. Monteleone: May I make this suggestion, if the Court please? If there are any items that Mr. McCall desires to check or take exception to and serve me with the various items I would be very glad to go over the matter with him, and if there is any correction we will make the correction. Mr. McCall has had a certified accountant spend weeks to go over these various items and he knows pretty well whether or not there are any objections to be made to the items. If he has any of those objections before the expiration of the 15 days that we have to file our briefs, I will be very glad to take the matter up with him.

Mr. McCall: Now one of those objections that are mentioned in this letter just filed here is the fact that they have charged the subcontractors, which they want to pass on to the surety, for one man working 25½ hours in one day, and the checks show that they paid him.

The Court: Maybe he got triple time for overtime a couple of hours.

Mr. McCall: No, 8 hours was straight time and 17½ hours was overtime. And there are hundreds and hundreds of items similar to that one.

Mr. Monteleone: Mr. McCall just called my attention to only one.

Mr. McCall: We called your attention to three pages of them, none of which he has given any explanation of whatever.

The Court: Have you any more evidence to offer in this case now?

Mr. McCall: That is all.

The Court: The case will stand submitted.

#### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 16th day of October, A.D. 1946.

/s/ AGNAR WAHLBERG,  
Official Reporter.

[Endorsed]: Filed May 16, 1947.

[Title of District Court and Cause.]

Before: Honorable Leon R. Yankwich,  
Judge Presiding

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California

Thursday, November 7, 1946, 10:00 a.m.

The Clerk: Number 5021-Y. Basich Brothers Construction Company v. Glens Falls Indemnity Company, et al.

Mr. Monteleone: Ready for the plaintiff, if the Court please.

Mr. McCall: Ready.

The Court: Gentlemen, I want to explain to you the circumstances under which I came to take over this case. While we do not have a master calendar, ever since I have been on this bench there has been a system of passing cases on from one Judge to another, where, for some reason, one Judge might have more time than the other. As you know, Judge Hall is in charge of the criminal department, and that department requires a Judge's complete attention, so I expressed a willingness to assist him in any matters that he felt needed immediate attention. He chose this case, and, under the rule, transferred it to me, with the consent of the senior Judge. An order was entered to that effect in compliance with the rules, signed by all three of us. He having set aside the submission, it was necessary to call you in to discuss the matter.

Mr. Monteleone: So far as the plaintiff is concerned, we are agreeable that the matter may stand resubmitted before your Honor.

The Court: I understand all the briefs are in. I have not read them. I have just glanced through the files and all the documentary evidence. The evidence is mostly documentary, except certain proceedings that were had on the pre-trial, which have been reported.

Mr. McCall: Yes, your Honor, the briefs are in. Mr. Monteleone, for the plaintiff, filed an opening brief, and we have filed our reply. He filed his closing brief, but in his closing brief—as I was talking to him a minute ago, he raised a question which had not heretofore been raised in any briefs, and that is the question, whether or not the laws of Arizona control over the laws of California.

The Court: Yes, I noticed that he claimed that the rule of modification of contract does not apply. That it is applied more liberally in Arizona than in California. That is known as *strictissimi juris*.

Mr. McCall: I would like an opportunity, may it please the Court, to reply to that question.

The Court: The only briefs I find are the points and authorities of plaintiff. That is way back. There is a late brief. There is a very small brief called: *Points and Authorities of Plaintiff in Support of Its Complaint*.

Mr. Monteleone: That is correct.

The Court: Then you have the *Glens Falls*



brief, which is a large brief, and that is denominated: Reply Brief?

Mr. McCall: That is correct.

The Court: Then Mr. Monteleone's closing brief.

Mr. McCall: It is in his closing brief that he raised for the first time the question of the Arizona law; and that is what I would like permission of the Court to reply to.

Mr. Monteleone: I may state in that regard, I have no objection to Mr. McCall replying, but the issue was not raised, and the first time the issue as to the Arizona law was raised was in answer to the contention held by Mr. McCall in his brief that the strict rule of construction adopted in California——

The Court: In other words, there was an issue tendered by Mr. McCall in his brief that there was a modification of the contract, which relieved the surety.

Mr. Monteleone: That is correct.

The Court: To which you replied in a general way that there was no modification; if there was, they knew of it, but by failure to act within two months they waived it, is that correct?

Mr. Monteleone: That is correct.

The Court: I have to familiarize myself with the issues. You gentlemen, in reply to each other's brief, have made it easier; you have picked up the brief, and found the corresponding answer under the same heading and subheading, which is very helpful to a Judge, especially one like myself, who

does not have a law clerk to analyze them, and hand it over to me, because I enjoy that work too much, and do it myself. Is there any question to the sufficiency of the notice by any subcontractors, under the statute; the notice by subcontractors to the surety of any claim under the contract?

Mr. McCall: There is no claim by subcontractors. This is a general contractor.

Mr. Monteleone: If your Honor please, in this matter the basis of the plaintiff's action is to recover for labor and material and supplies furnished the subcontractor.

The Court: In *ex rel Hargis v. Maryland Casualty Co.*, 64 Fed. Supp. 522, it merely involved the sufficiency of the notice, by one furnishing materials to the subcontractor. I don't think that is involved here. There I held that actual notice took the place of any defect in the formal notice; especially where the contractor was a party and received bills addressed jointly to him and the subcontractor, that it was almost a contract for the benefit of a third party. I don't think that is involved. At any rate, it is an interesting problem, and you may want to read the case.

Mr. McCall: I checked that case, your Honor. There is a question—the defendant defends on one point, that the plaintiff, who is a general contractor, did not give prompt notice.

The Court: Let me ask you one other question. I notice a very elaborate bill of particulars, and in looking at the transcript I notice, I think at the pre-trial, some suggestion was made about giving

one amount, and a total disagreement as to the amount actually paid out.

Mr. McCall: Yes, your Honor, the defendant is unable to determine what amount was paid out under the subcontract, and what amount was paid out under the general contract. And our auditor—it wasn't necessary to find the line of demarkation between the two. Mr. Monteleone, is submitting our evidence, which we had agreed on, wound up by stating it is our understanding we are submitting this on the question of liability, and if the Court should find there was no liability on the part of the defendant that would end the case. If the Court should find that there is liability on the part of the defendant then under our former agreement it would be necessary to try the question of the amount of liability, if any. Any suggestions from your Honor I would be glad to have.

The Court: I may say, gentlemen, I have in the past submitted matters in that maner, but the older I get the more satisfied I am that that is an unsatisfactory way, unless the situation is such as we encounter in tax cases, where the only question is liability of the taxpayer, and the amount can readily be computed. For that reason we have adopted a rule from the Tax Court that in all these cases the Court may render judgment for the defendant, the amount of judgment to be computed by the parties. Of course, there it is only a matter of computation. It could be done without taking evidence.

Mr. Monteleone: In this matter, if your Honor pleases, the records of the plaintiff show that the

items set forth in the bill of particulars were monies actually paid for labor or supplies that were furnished to the subcontractor. The defendant had been given an opportunity of having a certified accountant spend three weeks, at least, going over the books and records, and I indicated to Mr. McCall if there were any items that were questioned by his auditor we would be very glad to submit those matters to the Court. But, the amounts were actually paid out on account of the subcontractor, and on no other account. If it is necessary to bring in the auditor who made the entries we will be glad to do so, but I thought after Mr. McCall's auditor had gone over the records and spent so much time, they would accept it, except for a few minor matters that came up in the last hearing before Judge Hall.

The Court: The last hearing before Judge Hall was September or July?

Mr. McCall: There was a hearing in July. The last one was in September.

The Court: July 8th. That is denominated pre-trial hearing.

Mr. Monteleone: We had a pre-trial hearing, and then a later hearing before Judge Harrison. That matter was transferred back to Judge Hall.

The Court: So long as we have time this morning, gentlemen, we may as well discuss it. That was the object in bringing you here, to find exactly how the situation was. Here is the last one, September 30th, before Judge Harrison, and October 4th, before Judge Hall.

Mr. McCall: That is the last time we were in Court, your Honor.

The Court: I notice Judge Hall raised exactly the same question I raised, and I had not seen this record; I merely looked at July.

Mr. Monteleone: What point is that, your Honor?

The Court: That is with regard to the amount.

Mr. McCall: That was raised by Judge Harrison.

The Court: Reading from the transcript of the hearing of October 14, 1946, beginning at the bottom of page 10:

“Mr. McCall: The reason of that, your Honor, is that it will show the Court the way the bill of particulars is built up and that the items are such that counsel cannot possibly stipulate to them. I see no way that they can be determined except by trial, either before the Court or before a master.

“The Court: Item by item?

“Mr. McCall: Well, we have no proof of the items, your Honor. There was millions of dollars spent at this place.

“The Court: Do either of you have any further exhibits or evidence to offer in the case at this time?

“Mr. Monteleone: We have none, if the Court please.

“Mr. McCall: None.

“The Court: The matter will stand submitted, with this proviso, that upon examination of the files and records, when I get to it I may restore it to the calendar for some testimony.

“Mr. McCall: It is understood that this evidence heretofore submitted by counsel for the plaintiff and the defendant is on the question of liability only, is that right?

“The Court: I do not know what it is on. I did not hear it.

“Mr. McCall: It was stipulated between counsel before that we would submit this evidence and then it would be submitted on briefs, and that was the original idea.

“The Court: Have you filed your briefs?

“Mr. Monteleone: I have, if the Court please.

“Mr. McCall: I have not filed a brief, and his brief is not designated as an opening brief. It is only designated as points and authorities, and I do not think it does his case justice, and I don't want to take the advantage of him. If he wants to denominate that as his opening brief, I shall certainly be glad to file a reply to it.

“Mr. Monteleone: I will stand on what I file, if the Court please.

“The Court: You do not desire to file any further briefs?

“Mr. Monteleone: No, I am satisfied with the brief I have already filed.

“Mr. McCall: Then may I file a reply brief?

“The Court: How long will you want for your reply brief?

“Mr. McCall: I would like to have 30 days.

“The Court: I thought you were in a hurry to get this case decided. You can write a brief in 10 days.

“Mr. McCall: I think I can.

“The Court: You will have 10 days to file a reply brief and the plaintiff will have 5 days thereafter to reply.

“Mr. Monteleone: That is sufficient.

“The Court: Then after 15 days the matter will stand submitted.

“Mr. McCall: On the question of liability?

“The Court: I haven’t seen it. Whatever you have here will be examined.

“I want to suggest this, however, that if it is at all possible to try this lawsuit all at once, it is my purpose and intention that it shall be tried rather than to determine a portion of it and then have an appeal taken on that to the Circuit Court of Appeals, and then come back and litigate over a bill of particulars which is three or four hundred pages long and involved thousands of items.

“In other words, we are duty bound under the rules of civil procedure and under plain principles of justice to dispose of the whole matter as quickly as possible, so I shall examine whatever you have and whatever you have submitted with that idea in mind.

“Mr. Monteleone: May I make this suggestion, if the Court please? If there are any items that Mr. McCall desires to check or take exception to and serve me with the various items I would be very glad to go over the matter with him, and if there is any correction we will make the correction. Mr. McCall has had a certified accountant spend weeks to go over these various items and he knows pretty well whether or not there are any objections to be

made to the items. If he has any of those objections before the expiration of the 15 days that we have to file our breifs, I will be very glad to take the matter up with him.

“Mr. McCall: Now one of those objections that are mentioned in this letter just filed here is the fact that they have charged the subcontractors, which they want to pass on to the surety, for one man working 25½ hours in one day, and the checks show that they paid him.

“The Court: Maybe he got triple time for overtime a couple of hours.

“Mr. McCall: No, 8 hours was straight time and 17½ hours was overtime. And there are hundreds and hundreds of items similar to that one.

“Mr. Monteleone: Mr. McCall just called my attention to only one.

“Mr. McCall: We called your attention to three pages of them, none of which he has given any explanation of whatever.

“The Court: Have you any more evidence to offer in this case now?

“Mr. McCall: That is all.

“The Court: The case will stand submitted.”

I would say, Mr. Monteleone, that while the Court did not specifically say that it was submitted on the question of liability it was merely because he had had no occasion to examine the file and briefs and determine it. Mr. McCall made it very plain that it did not submit the matter as to the amounts collected. So that is a matter that will have to be determined in one way or another.



Mr. Monteleone: If your Honor please, we will be very glad to bring the auditor, and bring all the cancelled checks to show what was actually paid out, and to whom payments were made.

The Court: It is against my custom, and Judge Hall intimated it is against his custom, to try to work out the matter in this manner unless the matter is purely a question of accounting that can be taken care of. I don't send lawsuits to a master. I am opposed to masters. I never used a master in my life, in the Superior Court or here, except in an accounting.

When it comes to the question of liability, that is a different question than accounting. There you are confronted with liability, and whether an item is proper and so forth. I am in a better position to determine that, than to have to do it later from a transcript before a master. I remember, in the 77-B proceeding they had in the Rindge estate, I had claims amounting to nearly a million dollars, and counsel asked me if I would not send it to a master. I said no, I would take it myself. It took 11 or 13 days to try it, and I drew only one appeal out of the entire group. I am certain if it had been sent to a master it would have drawn more appeals than that.

In a case like this, it is not determining what the books show. It is what actually was paid, to determine liability.

Mr. Monteleone: That is correct, if your Honor please. The reason I suggested to Mr. McCall, if there was any actual question that the bills were

actually paid, it is a different matter. I don't understand Mr. McCall to raise the question that the bills were actually paid.

The Court: It is not a question of whether they were paid, but whether they were correctly paid.

Mr. Monteleone: He does not raise the question. In other words, we have the payroll of the subcontractor of what was paid in actual wages, and there was equipment rented by the subcontractors, and the rentals were paid. I don't know whether your Honor has read the deposition.

The Court: Not yet. I only got this yesterday morning. I work fast, Mr. Monteleone, but not that fast.

Mr. Monteleone: The amount of rental paid was under O.P.A. regulations, so there is a question as to the reasonableness of it. If your Honor desires to give us a date to prove those items, I would be very glad to bring the auditor and parties in and prove all of those items set forth in the bill of particulars were paid, for labor or rental on equipment used by the subcontractor.

The Court: So long as the matter was submitted to Judge Hall with this understanding I think we had better let it stand as it is, with this understanding also: That I may, if I choose, regardless of which way I decide it, call for additional testimony to be presented on the subject of damages, because there is this situation: Supposing I find no liability, and supposing you are wrong, how are you going to make findings unless you waive findings as to the amount?

Our Circuit Court of Appeals has interpreted the new rules rather strictly. They have required findings on a non-suit, which is unheard of in modern procedure. The idea of a non-suit is that you have no claim; that you have not proven a cause of action. What kind of findings could you make? Negatives ones. So we have to watch constantly as to what they are going to do next.

Therefore, it would not do to decide liability, and then have no testimony in the record one way or the other as to the amount, assuming there was liability. Suppose I had decided against liability; you then took an appeal, you would have to protect your record, and would have to have findings. I would have to make findings as to the amount, unless you waived findings as to that amount. If you do that, you may go up, and I may be wrong, and the case will have to come back.

Mr. Monteleone: I think the Court's suggestion is appropriate. We are agreeable.

The Court: If I knew more about the case I would fix a date now; but so long as there is another brief due I will let the brief come in, I will consider the matter, and will then probably call you in. In a case like this the best way is to leave the matter, as I am doing now, and I will determine whether further proceedings are necessary. Mr. McCall might recede from his position, and be satisfied with a reaudit, or something like that. But certainly, as there is another question being raised, I think we will let it stand as it is. That is, the

matter will stand submitted when the final brief is in.

How much time do you want for your additional brief? Limit it to one point, as to what the law of Arizona is on the subject. Or do you contest whether the law of Arizona governs?

Mr. Monteleone: That is the main point, it seems to me.

Mr. McCall: There was another point that he raised for the first time in his closing brief.

The Court: Under the decision in the famous case of *Erie Railroad v. Tompkins*, in the matter of contracts, the law of the state governs where the contract was made and the contract was performed.

Mr. McCall: That is our position, your Honor. He alleges in the complaint that the surety bond was given to the corporation at its headquarters in Alhambra, and was executed and delivered here, and, if there should be a judgment for the plaintiff in this case it is elementary that it would be paid here. So that is our position. We have that case your Honor just mentioned, and several others on that point we would like to submit.

There is one more question in the plaintiff's closing brief. He also raises the question of waiver, and I don't have the brief with me where he said if the Court should find that he should have pleaded waiver that he asks permission to amend his complaint, and he sets out what he would like to put in his amended complaint. It is our position that that would be stating a new cause of action. We would like to be heard on that point.

The Court: Here is his closing brief. He calls it a reply brief. Of course, gentlemen, you realize this: that under our liberal rules of pleading the Court may find facts in accordance with the record, even without any amendments. The section is very plain on that subject: Rule 15 (b):

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.”

And under that you can change the theory of the entire action.

Mr. McCall: It is my understanding of the law that no testimony can be introduced on waiver unless waiver has been pleaded by plaintiff. Therefore, in my brief I did not cover the question of waiver as I would have covered it, had it been raised. Is it O.K. for me to cover that point briefly in my reply?

The Court: All right. You want to review the question as to whether the Arizona law or the California law covers it. Of course, the obligations of a contract would be covered by the place of performance. The obligation of the surety ordinarily would be governed by the place where the surety's

undertaking was executed, and is to be performed.

Since the famous Tompkins case, the Circuit Court of Appeals in a case of mine, Ostroff v. New York Life, has held that where the party takes out a life insurance contract, and resides here, and the company has an office, it is a California contract, despite the fact that the contract says that the premiums are due in New York, and also that any benefits are to be paid in New York. They took judicial notice of the fact that all large companies maintain offices here.

I am familiar with the case involving surety. That was one of the cases of our Circuit, where they ruled the other way. That was one of the cases I agreed to try piecemeal. The result was just as I predicted. I held, because the contract said premiums are paid in New York and benefits are paid in New York, regardless of the effect that as an accommodation they are actually payable here, because they have an office in every large city in the country, would make it a New York contract. The non-contestability clause in New York has been interpreted to be within the statute of limitations. Not even fraud can get behind it. But the California courts have held the other way. So just by interpreting one contract rather than another, the entire complexion of a lawsuit is changed, they having held that it is a California contract; and our courts have held that fraud, and making misrepresentations as to help, are grounds for setting aside, they have held that you can try a case on its merits.

Mr. McCall: That is similar to the case we have here.

The Court: It just happened to come to me indirectly. Of course, had they sustained me the lawsuit would have been at an end, but it would have been much better, and would have saved a lot of time had I proceeded to try it.

Mr. McCall: On that point, I think in fairness to Court and counsel, it might be stated that the reason counsel for the plaintiff and I agreed to submit the case, in the first instance, when we reached that conclusion, was because we could not get a trial date, and it might be if this Court would prefer to give us a date we could handle the whole thing at one time.

The Court: I can't say at the present time. I took it with the idea that it could be decided on the record. Of course, Judge Hall has the criminal department. Had he told me this last week my attitude would have been different. As it is, I have filled my calendar on all of the trial dates, and I am to be in San Diego for two weeks in December. At the present time I think it would be just as well to let it stand, because if we reopen it for additional testimony I don't think it should be a lengthy proceeding.

Mr. McCall: That is right. I am happy to submit it on that proposition.

Mr. Monteleone: How much time, Mr. McCall, do you want?

Mr. McCall: I will finish this week. Monday it

will be wound up. If the Court says, I will make it tomorrow.

The Court: There is no such rush. I will have your closing memorandum, limited to two questions only: Whether the issue of waiver is before the Court on the pleadings; and, second, whether the question of modification is governed by the Arizona or California law.

Mr. Monteleone: If your Honor please, I have run into a California case. I don't have it with me now, because I came directly from Pomona to be here this morning. It is a recent Supreme Court decision, and holds that where a special defense is raised in the answer, raising matters which the plaintiff does not concede, that you are not required to allege in your complaint any allegations of estoppel. It did not go to the point of waiver, but was confined to the question of estoppel. In other words, in our complaint we do not concede that we did not give the notice, or there was any default, as contended by defendant. The issue is raised in the pleadings the first time, by the answer.

The Court: You cannot anticipate. Under the present system of pleadings you do not need to deny any new matter.

Mr. Monteleone: The Supreme Court has held we are not required to allege and anticipate in the complaint the question of estoppel, by having a pleading to that effect. It is waived.

The Court: We will let the matter stand for the present. I will give you five days time for a closing memorandum on those two questions.



Mr. McCall: There is one more question here, your Honor. In the pre-trial memorandum, if that is what it is called, of October 14th—I believe it was in Judge Hall's court—that is, the date when we were handing in our exhibits, at my request he ordered that the insurance policies mentioned in Schedule 7 of plaintiff's bill of particulars be brought into the court. He made an order that those insurance policies be brought into court as exhibits. We have never seen those, and counsel for the plaintiff stated at that time, according to the record, that they would be brought in. They were filed, but I checked the record yesterday, and they had not been filed, according to the record. There is one compensation policy, which has been filed, and another one, and it does not refer to this particular job.

The Court: What is that?

Mr. McCall: There was only one compensation policy, which has been filed, complying with the order of the court, and it is dated 1943. It refers to two other jobs. It does not refer to this job, and it does state that there is no subcontractor on the job.

The other insurance policy, may it please the Court, has been brought into court. I suggested that they be brought in, so that the Court could have them before it.

Mr. Monteleone: As far as the compensation policy is concerned, as Mr. McCall has stated, it does not cover this job. It seems the state of Ari-

zona has a procedure in making an order in Phoenix, or wherever the headquarters are, to extend the policy to cover other jobs. That was done in this particular case, although it does not appear in the policy itself. The policy is the existing policy until cancelled, and has recently been cancelled by the state of Arizona. So the policy introduced in evidence is the policy which covers this particular job.

Mr. McCall: Counsel probably is quite correct, that one policy will be used for several jobs, as the jobs are taken in. There is what is called a rider attached to each policy. There is nothing attached to this policy, and it indicates on its face to refer to two other jobs back in 1933 and 1934, and excludes this job.

The Court: I don't know as to what issue that is material.

Mr. McCall: It is our position that for one defense—I believe it is No. 10, that there was never the relationship of obligee and principal between the parties in question, that is between the general contractor and the subcontractor, for the reason that a long time before they got the bond, and unknown to the surety, the general contractor put the alleged subcontractor on a job, took out all of his insurance for him, or rather all of his employees were covered in the policy—all the insurance policies which were held by the general contractor. The subcontractor had no policies. He had no payroll. Every check was written by the general contractor, and every act done from then on indicated that

there was the relation of master and servant, instead of general contractor and subcontractor.

We asked, way back in July, for the privilege of seeing these policies, and finally, when they were not exhibited to us, we sent an auditor out to look over the records, and counsel for the plaintiff made the statement at the last pretrial that these policies were exhibited to the auditor, but he denies that, and says although he asked for them many times, they were not exhibited to him.

It is my contention that whatever these policies show would be material in this case, whether they be for us or against us. As a matter of fact, the policy which has been submitted, which counsel says is the correct one, states, in answer to the question, that there is no subcontractor on the job. That is the reason, your Honor, we would like to have it submitted.

The Court: Can you identify those?

Mr. Monteleone: I have produced the only compensation policy we have, issued by the State of Arizona. Counsel has been given the opportunity to check in Arizona the public records, and if he can find anything else, I have no objection that they be introduced into evidence. We don't have anything, except what I introduced, except there may be public liability policies. All we had we introduced in evidence.

Mr. McCall: May I call the Court's attention to page 2 of Schedule VI, page 2 of the Bill of Particulars, where the plaintiff has listed, "Insurance includes Compensation, Public Liability, Property

Damage, California Unemployment, Federal Old Age and Federal Excise," for which he has, in his Bill of Particulars, charged the defendant \$9,216.51.

Mr. Monteleone: Under the subcontract, if your Honor please, it provides specifically if the subcontractor fails to make these payments, the prime contractor can make the payments and charge them against the subcontractor.

The Court: That is contained in most of the contracts.

Mr. McCall: And in the case counsel refers to, that is why the subcontractor takes out insurance, or it is taken out for him. Then the general contractor pays for his premiums, that is not the case here. We have never been permitted to see the policies for which he is charging us \$9,216.51. He says he does not have them.

The Court: If a definite order has been made, it should be complied with, but it seems to me that those contracts have a bearing only on the particular item, and we have decided to leave the question of the amounts open for the present. Any statements or admissions that may be contained therein that might be used on another issue cannot be determined until they are produced.

Mr. McCall: That's right. If he never produces them we will never have the advantage of them in our defense.

Mr. Monteleone: If your Honor please, again I advise that all I know is that it is the contention of the plaintiff that the policy introduced in evidence

was by an order made in Arizona extended to cover this particular job.

The Court: It is up to you to produce the order made in Arizona which made it applicable to other jobs.

Mr. Monteleone: Do you want the public liability policies?

Mr. McCall: It has been stipulated several times he would bring them in—all of these policies mentioned on page 2 of our Bill of Particulars, for which he seeks to charge us.

The Court: The Bill of Particulars merely sums them up.

Mr. McCall: I might say this: The plaintiff has refused and failed to tell us what the companies are, and the policy numbers of the policies, when they were written, or anything about them.

Mr. Monteleone: Mr. McCall, I have not refused you anything in that respect. You know it to be a fact.

Mr. McCall: May it be stipulated here then that those companies, and the names of them will be brought in, and the policies filed.

The Court: I think we will have to make a change in the form of the order. I will ask the plaintiff to further particularize the items set forth on page 2 of Schedule VI, Insurance, by giving the names of the companies, and that the originals be left with the Clerk, not as exhibits, but be left with the Clerk so counsel may examine them. That will not interfere with your writing your brief, will it?

Mr. McCall: No, it will not. If any questions

come up as a matter of defense, I am sure the Court will consider them.

The Court: As long as I mentioned two companion cases, I will state that my opinion was published in 23 Fed. Sup. 724, dated June 17, 1938. The opinion of the Circuit was rendered on July 21, 1939, and is reported in 104 Fed. 2nd, 986. Judge Wilbur dissented. He felt my interpretation was correct. There was this companion case which follows that, in which there is also a dissent. This case was right after the Erie-Tompkins case said there was no Federal law, and we were trying to find out as to each contract, what kind it was. You can see that our judges of long experience have trouble in agreeing whether a contract is covered by one law or another.

The matter will stand submitted, and I will leave the other matter open, and when I reach a conclusion as to the legal questions involved I will either give you written notice, or call you up and tell you what conclusion I have reached. If it becomes necessary to take additional testimony, we will fix a time.

The Clerk: There is no objection by counsel to the submission of this case?

Mr. McCall: There is none.

Mr. Monteleone: No objection.

Mr. McCall: There is no otime limit in which to submit the insurance?

The Court: Five days.

Mr. McCall: Five days from my memorandum?

The Court: Five days, running from today.

That is why I asked you if you wanted to see them before you wrote your memorandum?

Mr. Monteleone: It may be I will have a certified of the order from Arizona.

The Court: Do you want 10 days?

Mr. Monteleone: Yes.

The Court: Then it will be 10 days, and they will run simultaneously. Let us have a distinct understanding that I will determine what, if any, additional testimony should be taken, and by whom, on the question of the amount.

Mr. McCall: Yes, your Honor.

Mr. Monteleone: That is agreeable to the plaintiff.

### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of January, A.D. 1947.

HENRY A. DEWING,  
Official Reporter.

[Endorsed]: Filed May 16, 1947.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF  
OF PROCEEDINGS

Los Angeles, California

Monday, November 25, 1946, 2:00 p.m.

Hon. Leon R. Yankwich, Judge Presiding.

The Court: Gentlemen, I have called you here to discuss with you certain matters, some of which relate to the condition of the record. Briefly, I may say that I have had an opportunity to study the voluminous files in the same, including the depositions. I have devoted both the weekend before last and last week to the study of this record.

There are certain things that are not clear, that should be clarified. I presume you are not to blame, because all the stipulations were oral, and entered into in open court; but it is very easy at times to overlook certain particular things, especially when the case goes to one judge, then to another judge, and back to the same judge again. Now it has come to me.

After the case was transferred to me I told you I was not in a position to make any suggestions, because I had not studied the record. I merely had made a cursory examination of the pleadings, to know what it was all about. Since then, as I have said, I have studied the record, studied the depositions, and there are several things which occur to me which should be rectified in the record.

In the first place I find that when the case was returned to Judge Hall, certain documents which



have heretofore been identified in Judge Harrison's court, and as to which an order was drawn, were offered in evidence by both sides. They were sufficiently identified by number. However, the record is not certain; at least I find no indication in writing, that the depositions which are in the file have ever been introduced. As you know, the mere deposition does not in itself make it available as an item of evidence.

We have three depositions in this matter. First, there is a deposition of Mr. Basich, which is a part of the file, attached to volume No. 1, and which was filed June 29, 1946. That deposition was taken on behalf of the defendant, being the deposition of Mr. Nick L. Basich. I gather that counsel, from the arguments they are making and the reference thereto, intended that this should be introduced in evidence, but there is no mark by the Clerk to indicate that any of the three depositions were introduced.

Mr. Monteleone: That was our understanding, if the Court please. Probably it was an oversight on the part of Mr. McCall and myself. So far as the plaintiff is concerned, at this time we offer the deposition of Nick L. Basich in evidence.

Mr. McCall: There is no objection.

The Court: The record shows that Plaintiff's Exhibits 1 to 19, have been received.

The Clerk: There are numbers missing. What numbers are we going to assign to the depositions?

The Court: They are in by reference. There is nothing attached to the Basich deposition. There are some exhibits attached to the other depositions.

That will be No. 20 in evidence. You will find that many of these exhibits are attached to both the complaint and answers, and were received by reference, in that manner. I don't think any copies are missing.

[Plaintiff's Exhibit No. 20 set out in full following Reporter's Transcript—See Index for Page Number.]

Mr. Monteleone: All the copies were introduced in evidence and marked as exhibits before Judge Harrison, if your Honor please.

The Court: Then they were withdrawn and re-introduced before Judge Hall, because Judge Harrison, when he decided not to go on with the case, told you to withdraw your exhibits.

Mr. Monteleone: That is correct.

The Court: You made an argument based on the depositions which are not technically in evidence. I am not trying to be too technical, but they are absolutely necessary for any record you may want to prepare in the case.

The next deposition is a deposition of George W. Kovich, who was a Basich foreman, or superintendent of the job—whatever he called himself.

Mr. Monteleone: At this time, if the Court please, plaintiff offers in evidence the deposition of George W. Kovich, which has already been presented to the Court.

Mr. McCall: No objection.

[Plaintiff's Exhibit No. 21 set out in full following Reporter's Transcript—See Index for Page Number.]

The Court: That was filed August 12, 1946. That will be Plaintiff's Exhibit No. 21. Then we have the deposition of Mr. Bray, the investigator who went down to the job, and made certain observations and certain reports to the defendant Indemnity Company.

Mr. Monteleone: At this time, if the Court please, plaintiff offers in evidence the deposition of John Bray.

Mr. McCall: No objection.

The Court: All right. As to the other exhibits, aside from the prime contract and the insurance policy, they were all in the letter, and, as I have said, I have not completed my study of the case, although I have read all the pleadings in the case, and have made some study of the law.

The Clerk: The deposition of John H. Bray, filed September 30, 1946, is Exhibit No. 22 in evidence.

[Plaintiff's Exhibit No. 22 set out in full following Reporter's Transcript—See Index for Page Number.]

The Court: Then, subject to any further order the Court shall make, it is understood that the matter is submitted by both sides upon the depositions and documentary evidence?

Mr. Monteleone: That is correct.

Mr. McCall: Yes.

The Court: That disposes of that. There is one other matter.

Mr. McCall: Your Honor, we have these in numerical order, and if it will do any good for me

to read them to the Clerk as we introduce them——

The Court: You can identify them for the benefit of the Clerk so you will have a record. My Clerk usually has on the front page a record of the exhibits.

The Clerk: Are these exhibits now in evidence?

Mr. Monteleone: We have stipulated that the exhibits that were introduced before Judge Harrison may be deemed introduced before this court in the same order as they were introduced before Judge Harrison.

The Court: Have you a list of the exhibits?

Mr. McCall: Yes, your Honor.

The Court: Will you hand it to the clerk so that he can reflect the exhibits.

The Clerk: What shall I do when I locate them—physically detach them?

The Court: Certainly. The plaintiff attaches a bunch of letters, and the defendant, to make sure, attaches the same to his answer.

Mr. McCall: Would it help if I would read these out?

The Court: Some of them are duplicates. There is another matter I want to talk to you about.

Mr. McCall: May it please the Court, my associate just called my attention to the fact that these exhibits are listed from 1 to 19 in the transcript of September 30th before Judge Harrison.

The Court: What page?

Mr. McCall: Page 3.

The Court: Here is the transcript of the proceedings before Judge Harrison. You can check

that list against this list. There is just one other matter I think should be specifically covered. At the pre-trial hearing before Judge Hall counsel for the defendants offered a stipulation relating to the manner in which employees of Duque & Frazzini, the subcontractors, were carried on the books, and state their relation to the Liability and Workmen's Compensation Acts. The record shows that the stipulation was not signed, and it was left with the clerk, who evidently filed it at the second hearing. However, there is this statement by Mr. Monteleone—I am reading from page 3, lines 16 to 21:

“I am willing to stipulate, and I do so stipulate now, that all of those records designated in the stipulation prepared by Mr. McCall indicate Basich Brothers as the employers. However, we want the privilege of explaining to the Court during the trial how it happened that Basich Brothers appears as the employers.”

That, of course, leaves the matter absolutely up in the air. It isn't a stipulation of anything, because it is merely a stipulation subject to explanation to be given at the trial. There is no further trial to be had. The only possible hearing to be had will be limited to the question of the expenditures made, and the amounts alleged to have been expended; so this is left up in the air, and should be corrected. The only way it can be corrected is by either stipulating to all these facts, or signing the stipulation which Mr. McCall has offered, and which was filed before Judge Hall on October 14th.

Mr. Monteleon: If your Honor please, when I stated that I wanted the opportunity of explaining—on its face itself it may appear that Basich Brothers were really the employers of these parties. The evidence which the plaintiff proposed to show is that Basich Brothers were accommodating Duque & Frazzini in order to get a rating from the Workmen's Compensation Commission.

The Court: That is what you are alleging; that is what the testimony is?

Mr. Monteleone: That's right. And that Basich Brothers had no control or supervision over any of the employees of Duque and Frazzini.

The Court: That is a conclusion which could not be stipulated to, because it is alleged that they did have control, and it is further alleged that Mr. Kovich saw them at work; that at least on one occasion he countermanded an order; and that from the very beginning they were carried not only on the books, but the indemnity policies and everything else were made to inure to their benefit. That is exactly what I want to find out. As this stands submitted, I will have to determine it on the basis of the testimony of these men, and on the basis of the showing made by stipulation, as to whether there was control or was not control.

Mr. Monteleone: That's the reason I would not want to stipulate, because we take the position that there was no control at any time.

The Court: Then, gentlemen, you have given me a case which simply cannot be decided upon the record. There is no stipulation. They will not

stipulate there was no control, because they are arguing you had a measure of control, which is incompatible with your position. Therefore, I want to know, am I to decide that question on the basis of the record, or am I just going to indulge in an abstract proposition of law? As it is, I have to try the entire lawsuit.

Mr. Monteleone: No, your Honor, we want the privilege of introducing evidence that Basich Brothers had no control whatsoever over the employees of Duque & Frazzini.

The Court: Then, of course, the case is not in a position to be submitted. Judge Hall was asked to take the submission of the case, and being busy thought that all matters that were subject to controversy could be decided on the basis of the record. I have since talked to him. He said he had not made a study of the record. He had no time. He merely took the view that the case was in a position where the Court could decide the question of liability, leaving only the other question, and that is the question of the amount.

How can a Court decide the question of liability when one of the strongest points urged was that there had been a complete modification of the contract; that as a matter of fact there was some joint control in all matters. In reality, although counsel does not use that argument, this was not the relationship of contractor and subcontractor, but to some extent they were engaged in a joint venture where, from the very beginning, they did not wait for them to fail to pay, but from the beginning

began paying wages and everything else, which is not what the contract says. That is the argument being made. How can I decide liability when the question of control is not closed, so far as the evidence is concerned?

Mr. Monteleone: If your Honor please, that is the reason I would not stipulate unless given an opportunity to explain.

The Court: I am not blaming anyone, gentlemen. I am merely pointing out to you what a study of this record has convinced me of, so it is quite evident from these very things that I am not in a position to decide the question of control and the question of the advancement of these monies. As I said, I am not blaming anybody. But I have taken this case over, and these matters occurred to me, which I want to discuss with you. In view of your statement I may as well stop here. But I am not going to stop. I have another suggestion to make, and that is this:

Mr. McCall: Before leaving the point, may I state something? It was my understanding that when all of these documents were resubmitted before Judge Hall counsel said, when I brought this stipulation, which I had signed, but which he had not signed, that he would stipulate to all matters therein contained, or words to that effect.

The Court: No, he did not. He reserved the right—

Mr. McCall: That was in the first case.

The Court: There is no reference to this particular stipulation in the hearing on October 14th.



I have the record in front of me. If you can find it I will be very glad to have you call my attention to it. The record is so voluminous that I will admit that I may have overlooked something, but I am quite sure, if you will examine the entire transcript—it is very short—you will find no reference to that stipulation.

Mr. McCall: I have before me the proposed stipulation, and if it is in order, I would suggest that counsel indicate what he is unable to stipulate to, and that might settle the whole question. I will just read this stipulation, and he can indicate what he is unable to stipulate to, and why.

The Court: That would be negative. He calls for a stipulation, but makes reservations. He wants some evidence to explain how things came about.

Mr. Monteleone: That is correct.

The Court: If that be true the case is not ready for submission, even on the question of liability, because there is evidence which the plaintiff desires to offer to explain how those things came about; and he has a right to do that.

Mr. McCall: Control, I do not think, was mentioned in this stipulation.

The Court: No, control is not mentioned; but the fact that they were carried is made one of the bases of your argument; that if the California law applies, these men modified the contract right from the very beginning. They did not work under this kind of a contract; and you had the right to be informed. You were not informed until April 5th. And even at that time your man Bray, in his testi-

mony, says he looked at the records, but he does not testify he was informed even at that time that these men had been carried on the payrolls. From the very beginning, as the bill of particulars shows, monies were paid out. They did not wait until he was in default on the bond, but paid out monies from the very beginning. On the basis of that argument there was a new relationship. If they offer evidence as to how it came about, there still remains the question for me to decide, whether that arrangement, not having been called to your attention, gives any strength to your argument. I can't decide it now until all the evidence is in.

Mr. McCall: The evidence we offered came from their own witnesses.

The Court: One side can't submit a case; both sides must submit the case. Therefore, if you are not in a position to make this stipulation the Court is not in a position to decide any question of liability.

Mr. Monteleone: I will be willing to stipulate that Basich Brothers exercised no control over the employee of Duque and Frazzini.

Mr. McCall: In view of the testimony of Mr. Basich and the superintendent, Mr. Kovich——

The Court: That is all right. That leaves the one other matter. Now, with this particular matter undecided, it follows, as a matter of course, if the case is reopened it has to be reopened for all purposes. I am satisfied, gentlemen, from a study of the record that this case should be split up as it is. Under the old equity rules it provided that if one

of the issues is such that the decision might decide the case, the Court had a right to try just that issue, and the determination was designated as a final judgment, from which an appeal lay.

I happened to run into that some years ago, and we had a very interesting case, which was not reported, although this point is not covered because everybody agreed that it could be done. That was a case where a foreign woman, the Countess of Santa Cruz sued her father-in-law for a portion of an estate left by some of her husband's forebears. Many questions were involved in that case, and one was the question of whether an ecclesiastical divorce, granted in Spain, had any effect in the matter. We decided—I mean, the lawyers for both sides and myself decided if the will were interpreted in a certain way the other issues would never have to be decided. In other words, if I interpreted the will contrary to the contention of the plaintiff there would be nothing else to try. So it was agreed to submit the matter, I received whatever evidence there was, heard arguments, and decided against the interpretation of the will which the plaintiff placed on it. The case was appealed. I remember one of the newer judges on the Circuit asked how it was possible to try a case piecemeal. His attention was called to the equity rules which allowed this to be done. There is only one section in the Rules of Civil Procedure which deals with the problem, and that is Section 42 (b), which says:

“The Court in furtherance of convenience or to avoid prejudice may order a separate trial

of any claim, cross-claim, counter-claim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third party claims, or issues.”

I do not know how the Circuit Court will interpret this rule; whether they will say that upon such trial findings shall be made, and that a judgment may be entered, and from that judgment an appeal shall lie, or whether it shall abide by the entire case. Our Circuit Court, for instance, has held that if I grant a non-suit upon the ground that the plaintiff has failed to prove a claim, I have to make findings. I was the victim of that ruling, so it is very plainly impressed upon my memory. So, upon their interpretation, I do not know whether such a ruling, in case I should rule against liability, could be considered final to the extent of warranting the making of findings, and excluding findings as to the amount, and sending the case up to the court. That is the same reasoning that Judge Harrison advanced.

There's one other reason why I think that the case should be reopened and testimony be received, unless you should stipulate as to expenditures made, and that, regardless of the question of liability, that they were properly made, and that they represent the measure of recovery sought in this case. To show you why, aside from these questions of law, it is important that this should be done, I call your attention to the fact that under the defenses made, the amount of monies paid out to and for the benefit

of the subcontractor by the contractor is made the basis for one of the most strongly argued points of the defense, that there was no liability, and that is the question of premature payment. It is conceded that some \$34,000.00 were prematurely paid; that is, that the payments exceeded 90 per cent, that at least \$4,000.00 was paid long before any money was even due.

I am not deciding that point. I want you to bear in mind that I am merely stating some of these things because I have not reached a definite conclusion as to the whole case. I have reached, as any student of the law must, certain conclusions as to legal principles. I shall refer to one of them in a minute, for your own benefit.

Unless it is stipulated that the amounts paid were actually paid on the day they are alleged to have been paid, leaving to me to determine whether they were properly paid, how can I arrive at any conclusion as to whether they constitute a premature payment or not? Of course, if I agreed with Mr. Monteleone, that payments made directly to the material men and labor men are not within the inhibition of these cases which hold that premature payments invalidate the contract—if I agreed with him on that I might let it stand. But my conviction at the present time is that there is no warrant in the law of California or the law of any other state for that position. In other words, I take it that the law of California specifically says that premature payments release the surety, and the best statement of this is contained in a case which is

commented on by both counsel, and that is the case of Pacific Coast Engineering Co. vs. Detroit Fidelity & Surety Co., 214 Cal. 382. Opposing this counsel has cited certain cases to the effect that where an owner of property, because of mechanic's liens makes direct payments to forestall mechanic's liens, that the doctrine of premature payment does not apply. But only one case cited bears such interpretation, and that is the case of Burr vs. Gardella, 53 Cal. Ap. 377. But in that case the Court did not lay down the rule that premature payments could be made. The Court held there that, because the contract, which was a public contract, specifically provided for the immediate payment of claims for labor and materials, that when read together with the other conditions of the bond which provided only for payment by the contractor, if they were not paid, that authorized the making of payments, and the Court said that the payments were not premature because the obligation to pay immediately was just as binding as the other obligation to pay when the other had not been paid. In other words, they were conflicting clauses, and the Court harmonized them in order not to penalize the owner who had paid out. Incidentally, that case was decided in 1921, and the Supreme Court of California in Siegel vs. Hechler, 181 Cal. 187, specifically held that even where the owner is compelled, in order to avoid the liens, to pay money to labor men and material men, he cannot recover to the extent of the premature payments.

Mr. Monteleone: If your Honor please, may I interrupt—

The Court: I am not arguing the case, I am merely telling you why I want this information. This is not an argument at all. I am only indicating why I believe all these documents will have to be set aside and the case set down for trial, for such evidence as you gentlemen desire to introduce. Otherwise, I am not in a position to decide any question in the case. I am indicating to you certain of my reactions to the legal principles I have suggested. Of course, if the case is reopened, and additional evidence introduced, you may argue, after all the evidence is in, both as to the law and as to the facts, without repeating what you have already said in the briefs.

In *Siegel v. Hechler*, 181 Cal., at 191, it is said, to show motivation, even in lien cases, the Courts have held that the premature payments exonerated pro tanto the surety. Quoting from said case:

“Under the law as it stood at the times these contracts were made and the work done, every person furnishing materials or doing work upon the building, whether for a subcontractor or for the general contractor, was entitled to file a lien upon the owner’s property and upon the building therefor, at any time within thirty days after he had ceased to labor or had ceased to furnish materials, and such person could also at any time give a stop notice to the owner and thereby authorize the owner to withhold from

the general contractor upon the principal contract. It appears from the evidence that the bills, aforesaid, were presented to Siegel and that the money was then due from Hechler to the respective claimants for work done or material furnished and used in the building. The answer does not allege, and it is not claimed, that the demands thus made upon Siegel were not then lienable under the law. A stop notice could have been given therefor immediately. Siegal, therefore, immediately incurred a liability, through this default, to have liens filed on the premises for these bills and stop notices given therefor to the owner to withhold money due to Siegel on the main contract. He was liable to be greatly embarrassed by these consequences of such failure on the part of Hechler. Such failure was a violation of Hechler's covenant to save the general contractor "free and harmless" from any and all liability which might accrue against or upon Siegel as the result of any default of Hechler. \* \* \* It was his right, if not his duty, to prevent as much of the damage" as might flow to him.

The Court then held that the payments there were justified under the circumstances, because the lien had accrued, the work had been done, and payment had been requested of him. But here is the rule they state on page 190:

"It is not an accurate statement of the law to say that the surety would be released from



the entire obligation by reason of premature payments. They would not be an alteration of the contract for the performance of which the defendant had become surety. They would be a departure therefrom or a violation thereof, affected by the parties during its performance, without the consent of the surety. The legal result of such departures would not be to release the surety from the entire obligation. The effect would be that Siegel would have no cause of action on the bond to recover from the surety that part of Hechler's defalcation that was made up of these premature payments."

So that the entire basis for this distinction is referable to the right to file a lien, and to the danger to the owner; and the Court, in pursuit of that policy, had sought, wherever possible, to justify premature payments, and if they are made under the mechanic's lien law they are released pro tanto, and if they are made otherwise there is a complete release, as the other case to which I have referred holds.

Now we are dealing with a contract, on work done for the United States Government, on land owned by the United States Government. Let me read the exact language of the bond:

"This bond is executed for the purpose of complying with the laws of the State of Arizona, and shall inure to the benefit of any and all persons who perform labor or furnish materials to be used in, or furnish appliances,

teams or power contributing to the work described in said contract, so as to give such persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for by the laws of the State of Arizona, or in a separate suit brought on this bond."

Counsel concedes that is an oversight; that they merely used the wrong form, and that no lien law of the State of Arizona can apply to work done for the Government of the United States.

Mr. Monteleone: Except under the Miller Act.

The Court: This is not an action under the Miller Act.

Mr. Monteleone: I understand: but the prime contractor would be liable.

The Court: I am not talking about what the prime contractor would be liable for, if the contractor were liable over there. This bond, however, does not write in anything that the Government could do under the other contract. It did not, merely because it referred to another contract, of necessity give Mr. Basich the same right the Government has as to him. That does not follow, because the Government under its prime contract has many rights which Mr. Basich does not reserve to him under the contract.

A contract is the measure of liability. The point I am making is this: This bond is not made to cover any mechanic's lien. Then, assuming that on one point the Arizona law applies, and on another, the California law applies—because I presume there is no Arizona law dealing with this topic—then the

reasoning for the exception to the rule does not apply, and if there were premature payments made without knowledge, it raises to question of whether the yare not either released entirely or released pro tanto under the rule of California, I am merely propounding questions. That's why the amounts actually paid became important on the question of liability. You cannot determine liability without the evidence on that subject being in.

There is one matter I want to refer to, and as to that matter I will state the conclusion I have reached, because I feel I should, and it may affect counsel's tactics in the presentation of additional evidence; and that is, that this bond is governed by the law of California and not by the law of Arizona. Ever since *Erie v Tompkins* was decided we have had many difficulties in determining what law governs.

You gentlemen cite the *Ostroff* case. While the *Ostroff* case was reversed, it was reversed merely because a stipulation was entered into that the agent called for the payment of premiums in California, and the benefits in New York, which would make it a New York contract; that the company maintained an office here, at which payments were received, and through which benefits were paid. So on the basis of that admission, which appears in open court, they held it was a New York contract.

I would not take judicial notice of the fact that agencies were established, and what they did, although I know I myself pay insurance in that manner. So it is a common rule of law that a surety

bond is governed by the law of the state in which it is made, unless by the terms of the contract itself it is made to comply with another law. If you eliminate that section, which provides a compliance with the law—because it cannot apply to the Government, because there is no lien against the Government—then the contract was made here, the premium was collected here, and it is performable here. And the general rule applying to a surety bond is that it is governed by the law of the state, and it is performed regardless of what the contract maybe.

It is admitted that the law of California is different from the law of Arizona in this respect: That California law by virtue of the mandate of the Legislature, says a contract of surety or guarantee shall be interpreted in the same manner as any other contract. I think I have given the substance of 2837 of the Civil Code. If there is a failure to comply with the condition precedent, or any changes which alter the complexion of the contract, there is a release of liability.

Arizona has adopted a distinction based upon a premise which is repudiated by our courts, and by most of the courts of the states, and by most of the writers on the subject, because at the present time suretyship is handled by companies organized for that purpose, and a different interpretation should apply.

I have read the four cases which have been cited on the subject, and there is only one that really is very revealing. The others merely the general

proposition. The first is Prescott National Bank v. Head, decided in 1907, 90 Pac. 328. Then follows Lancaster v. Becker, 224 Pac. 810; New York Indemnity Co. v. May, 295 Pac. 314; and the last case cited by counsel Massachusetts Bonding and Insurance Company v. Lentz, 9 Pac. 408.

I have not run down these cases, gentlemen. I have contented myself with the cases you have cited. Of course, when I study a case, when I make notes, I try to supplement the work of counsel, and if I find a case is old, I want to make sure it is still the law. I have not done it in this case. I think, Mr. Monteleone, those are the only cases you have cited from Arizona. If there is one more, I have probably missed it.

Mr. Monteleone: There was only one case. I think that is very important.

The Court: In view of the fact that the case is going to be reopened for the purpose of showing the true relationship between the parties, and answering the proposition of what, if any, measure of control may have been exercised, it is important to note that the Supreme Court of Arizona, in applying these principles, has insisted that modifications are not the basis for exonerating the surety, if they are of such character that the court can say that the essential features and objects of the original contract were maintained. If the changes are of substance even the liberal Arizona law would not release the surety, and this for the very obvious reason which the court gives in the case referred to, Prescott National Bank v. Head, that even a liberal interpreta-

tion will not be allowed if the changes, in effect, make a new contract a substitute for the original contract. This is a paragraph, Mr. Monteleone, that you referred to several times. I think you cite it in full. I will read it.

“Paraphrasing this latter expression of the Supreme Court of the United States, we find in the case before us that the alteration in the manner of fulfilling the construction contract did not in effect make a new contract, or make a substitute for the original contract; that the essential features and the objects of the original contract were maintained; that the parties without any legal constraint upon themselves made modifications in detail, the entire expense of which was immediately borne by the obligee in the surety contract, did not add to the liability of the sureties on the contractor’s bond and did not effect or change the contract price in any manner whatever. Therefore, we conclude that these departures did not operate to discharge the sureties.”

In other words, even the Supreme Court of Arizona, liberal as it is, does not say that you can make a change of a substantial nature in the relationship of the parties and still hold the surety, who has no knowledge of the changes, and was not consulted before they were agreed to by the parties, because I think if that were true the Arizona decision would lead to an absurdity, and would subject to surety company to obligations upon modified con-

ditions which its bond did not underwrite. So that even if I adopt the view that this is an Arizona contract we still have the problem of whether these changes were substantial or not, because if they were, then, of course, the same rule would apply as applied if we consider the contract, as I am inclined to at the present time, a California contract to be governed by California law.

Mr. Monteleone: What changes does your Honor contend were made in the contract that this contract itself does not specify?

The Court: I am not making findings as to what changes were made. I am merely saying that the defendants contend that many changes were made. The defendants contend they advanced money right from the very beginning, before any became due, and payments were made direct by the contractor, the contractor carrying the employees on their payrolls subject to their own indemnity, making contracts for equipment, renting their own equipment, and all this changing the entire complexion of the entire contract, so that the relationship of contractor and subcontractor did not exist; and it was really that of two persons who, for certain purposes, were engaged in a joint venture.

I am not deciding the case. The only conclusion I have reached is that this contract is governed by the California law and not the Arizona law. I have read all the cases you have cited. I cannot for the life of me see that this is an Arizona contract, but I say, even if it is an Arizona contract, then of course the argument is made that there have been

substantial changes; I am talking about changes; I am not talking about notices; so for that reason also the evidence of what was done becomes material; the payments that were made also become material, to determine what, if any, changes were made in the relationship of the parties.

One other reason why I think the case should be reopened unconditionally is this: In the complaint plaintiff alleges that the defendants have been in default ever since the beginning, and at all times thereafter, I will read the allegation, which is Paragraph X:

“That said Duque and Frazzini entered upon the performance of the requirements of their said subcontract with plaintiff, a copy of which is hereto attached and marked ‘Exhibit A’ but failed to prosecute said work therein required of them continuously with sufficient workmen and/or equipment, or to erect two plants each capable of producing 800 cubic yards of suitable material a day.”

Then you allege they failed to do certain things after April 5th. Then in Paragraph XI you allege that after they commenced work they failed and neglected to pay labor.

In other words, it is limited to the entire period. On the basis of allegation of certain facts in the case the defendants allege that they were in default. In your brief you take definitely the position that it was no default until there was an abandonment of the work; an abandonment on the 8th of June.

Mr. Monteleone: I don't think there was a de-



fault. I took the position that there were partial defaults.

The Court: You cite the case of *Union Sugar Company v. Hollister Estate* to this effect, but it does not alter the position. When the first breach occurs it is not the duty of the other side to treat the contract as abandoned. He may not do anything about it, and then rely upon a subsequent breach. That is a general proposition of law; and in the case you cite, in 3 Cal. 2nd 740, the court made that statement merely in order to save the claim from the statute of limitation. In other words, they said that where several breaches occur you are not bound to wait until the first breach. You can wait for the next breach and the next one, then date your claim, so far as the statute of limitations is concerned, from the last breach.

That does not solve the problem here, because counsel say that up to April 5th, when you gave them the first written notice of any difficulties, that several breaches had already occurred, and that you had failed to give them notice. Therefore, it becomes very important that all the evidence relating to what actually took place, if there is any more than is contained in these affidavits of the two men, Kovick and Nick Basich, be gone into, and not leave anything for further discussion.

Another thing: The record is not very clear as to what actually took place on June 8th. Duque & Frazzini have not testified. The testimony is merely that they were notified that he was quitting the job, and they went on and completed the work, but not

until a few days afterward did they notify them, and even then it was not a request to do anything, but merely a general statement, because, in fact, if you were completing the contract on the basis of that, it is alleged that you chose to complete the contract without giving them the first opportunity; that you were under obligations to the Government, but there was nothing in the contract you have which said that you have the right to complete it, and the doctrine of minimizing loss does not mean completing the work. There is no case that warrants that. The doctrine of minimizing loss occurs mostly in torts. When applied in a contract it means merely that a man should protect the property. I have not found any cases you could have cited that hold to the extent that minimizing damage means that you can walk right in and conclude it.

The Government can only do certain things. The Government cannot command. And because the Government had certain rights in the contract with Basich, it does not necessarily follow that Basich had corresponding rights, unless they were stipulated in the contract.

I have tried many of these cases, but I will say frankly that the evidence to my mind is very unsatisfactory. Another thing is this: When you take a case upon the record already made, and no other testimony, you deprive yourself, as a judge, of the some important safeguard, and that is the right to judge the credibility of witnesses, from their demeanor on the stand and the manner in which they answer certain questions. The Circuit

Court has said that when a case is tried upon depositions solely that they are just as good a judge as I am of the inference to be drawn. That is what happens in many admiralty cases. If the evidence were clear you should not hesitate to take the responsibility. But it is not clear.

To sum up, we have three matters: First, here is no definite stipulation as to the relationship of the defendants' employees to the protective insurances which were carried by Basich, other than the general statement that they were carried on the payroll. The circumstances relating to the payroll have not been gone into, and Mr. Monteleone himself is not satisfied with that. If the relationship were that of contractor and subcontractor, dealing at arm's length, why didn't you wait until something became due? Why did you, in advance, pay \$4000.00, when, according to the engineer, they had no money coming at all?

Mr. Monteleone: If your Honor please, the evidence will explain——

The Court: I am just telling you my views on the matter.

Mr. Monteleone: Did your Honor discuss the matter of waiver? We have the question of whether or not the surety waived——

The Court: That is a question of fact to be determined on the evidence. I am not commenting on it, because I do not think that I should express any opinion, even if I had reached a definite conclusion on it. I have not reached a definite conclusion as to whether there was a waiver. Mr. Bray

until a few days afterward did they notify them, and even then it was not a request to do anything, but merely a general statement, because, in fact, if you were completing the contract on the basis of that, it is alleged that you chose to complete the contract without giving them the first opportunity; that you were under obligations to the Government, but there was nothing in the contract you have which said that you have the right to complete it, and the doctrine of minimizing loss does not mean completing the work. There is no case that warrants that. The doctrine of minimizing loss occurs mostly in torts. When applied in a contract it means merely that a man should protect the property. I have not found any cases you could have cited that hold to the extent that minimizing damage means that you can walk right in and conclude it.

The Government can only do certain things. The Government cannot command. And because the Government had certain rights in the contract with Basich, it does not necessarily follow that Basich had corresponding rights, unless they were stipulated in the contract.

I have tried many of these cases, but I will say frankly that the evidence to my mind is very unsatisfactory. Another thing is this: When you take a case upon the record already made, and no other testimony, you deprive yourself, as a judge, of the some important safeguard, and that is the right to judge the credibility of witnesses, from their demeanor on the stand and the manner in which they answer certain questions. The Circuit

Court has said that when a case is tried upon depositions solely that they are just as good a judge as I am of the inference to be drawn. That is what happens in many admiralty cases. If the evidence were clear you should not hesitate to take the responsibility. But it is not clear.

To sum up, we have three matters: First, here is no definite stipulation as to the relationship of the defendants' employees to the protective insurances which were carried by Basich, other than the general statement that they were carried on the payroll. The circumstances relating to the payroll have not been gone into, and Mr. Monteleone himself is not satisfied with that. If the relationship were that of contractor and subcontractor, dealing at arm's length, why didn't you wait until something became due? Why did you, in advance, pay \$4000.00, when, according to the engineer, they had no money coming at all?

Mr. Monteleone: If your Honor please, the evidence will explain——

The Court: I am just telling you my views on the matter.

Mr. Monteleone: Did your Honor discuss the matter of waiver? We have the question of whether or not the surety waived——

The Court: That is a question of fact to be determined on the evidence. I am not commenting on it, because I do not think that I should express any opinion, even if I had reached a definite conclusion on it. I have not reached a definite conclusion as to whether there was a waiver. Mr. Bray

was merely an investigator. He was not an officer; he was not a person who entered into the contract, or modified the contract. He merely was somebody who went there to see something and report; so that is all the evidence there is upon which an alleged waiver is based.

You gentlemen have lived with this case for a long time, while I have had four or five days to work on it. It is a very difficult record. You have briefed it very thoroughly, on both sides. The briefs were started in such a manner that instead of three you have four briefs. So it is a strenuous job on the part of the judge to go over a record like this and form a conception of the case. I am giving you my reactions merely to indicate why I believe that the submission should be set aside, and the case set down for trial. And when it is tried that the whole matter be gone into, so when it is submitted you will have a record with no reservations, which you do not have at the present time, even on the question of liability.

One thing is to be borne in mind, that in what I have said I am not to be understood as indicating any definite opinion as to the case. I have merely indicated one definite opinion as to the law, which I have a right to do, having studied all the law that has been offered on the subject. I have also indicated why certain problems which have been raised have given rise to certain difficulties which I think can only be overcome if the case is reopened and set down for a definite trial; then resubmitted, with such additional oral argument as I shall designate.

You can see why it is always best to have oral argument, because an oral argument brings things out which a brief can never bring out. So I will allow an oral argument later on. Had I known what was going to happen last week, and had I reached the conclusion that the case should be reopened, I could have had you come up last week, and have taken two or three days to finish this additional testimony. But it is hard to tell, when a case begins, how long it is going to last. We had a case which counsel were certain would take three days at least. It took just exactly one day, because we limited the issues in the morning session, and the limitation of testimony resulted in a shorter case, and the case was concluded at five o'clock that afternoon.

I am making this explanation, because when I took the case I understood it was an urgent matter. That was the reason I took it over from Judge Hall. My calendar is in very good shape, but I am leaving this week-end to go to San Diego, and shall be there holding court for three weeks. I cannot therefore give you a date. I probably might have given you a date at the time the case was submitted, but I thought, as Judge Hall thought, that the matter could be decided on the record, and I did not reach the conclusion really until I called you and even then some of the things I call to your attention now were not included in the object of my call. As a matter of fact, the only matter I was going to bring out, had you come here Wednesday or Thursday, being in the midst of a trial, would have taken only a few minutes. I intended merely to indicate

to you that I thought an accounting should be gone into, but the other matters, the deficiencies in the evidence, I did not know about. I had not gone that far, and had not read all the depositions.

Mr. Monteleone: Your Honor enumerated what you wanted, and started with No. 1. I do not know whether you intended to continue.

The Court: I merely have a note to follow. In the first place, on the matter of depositions to be put in, unless you stipulate as to the expenditures and the manner of their making, the entire bill of particulars should be gone into. And, if you are unable to stipulate as to the payroll, the insurance and the like, so far as they bear on the control, those matters will have to be gone into.

Then, as I said, the additional testimony should be brought in to clarify what exactly took place on June 8th. At the present time I believe the testimony is rather unsatisfactory, and as I now take the view, that that was the latter breach, and was not an abandonment, I feel that should be added.

I have spoken to you because some of these things arise from your side. I spoke just as much to Mr. McCall, because he might want, in view of the statement I have made, to bring in other testimony. to produce the members of the firm, or any one representing the subcontractor, to give their version of what took place. He is arguing they prevented him from carrying on, and the evidence, to my mind, is not sufficient to warrant findings one way or the other. It is unsatisfactory. If, after you consider the matter, you desire, without repeating



what you have in the depositions, to bring back some of the same witnesses for either further examination or cross-examination, it can be done.

Mr. Monteleone: What date will your Honor have?

The Court: Gentlemen, I have been setting cases ahead of this case, and I have made other arrangements about San Diego. Although it is not my turn there I am merely going down to help out with the calendar. This month is taken up, and January, with the holidays coming in, I have cases as late as January 21st. I can give you January 28th.

Mr. Monteleone: I have a jury trial, which has been continued twice, if your Honor please, set for January 30, and this may take several days. I was wondering if a few days after the 30th.

The Court: I have no objection. If you want, I will give you a clear week beginning February 4th.

The submission is vacated, and the cause is set for Tuesday, February 4th, for hearing along the lines indicated by the court in its statement, for the completion of the trial.

Mr. McCall: All the records now in will stand as they are?

The Court: Yes, all the depositions are in, and all the exhibits are in. The purpose of reopening is merely for additional testimony along the lines indicated.

## CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 2nd day of January, A. D. 1947.

/s/ HENRY A. DEWING,  
Official Reporter.

[Endorsed]: Filed May 16, 1947.

---

[Title of District Court and Cause.]

Before: Honorable Leon R. Yankwich,  
Judge Presiding

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California  
February 4, 1947, 10:00 a.m.

Mr. Monteleone: Your Honor, since we had our discussion before the court on the last occasion I proceeded to take the deposition of Carson Frazzini at Reno, Nevada. Mr. McCall was present and I was present, and at this time, if there is no ob-

jection on the part of the defendant, the plaintiff will offer in evidence this deposition of Carson Frazzini, who happens to be a member of Duque & Frazzini, subcontractors.

Mr. McCall: No objection.

The Clerk: How will I mark this?

The Court: As an exhibit.

The Clerk: Does anybody have the number to be given to it?

Mr. McCall: Yes, I have it. The last exhibit for the plaintiff was No. 23.

The Clerk: This will be Plaintiff's Exhibit 24.

Mr. Monteleone: In reading over the deposition, if your Honor please, I notice the reporter undoubtedly made a clerical error. I would like to call the same to the court's attention, and probably Mr. McCall will not object to the correction thereof. On page 27, line 26, and page 49, line 5, instead of "Basich" the name was "Bray." Is that correct, Mr. McCall?

Mr. McCall: Yes, that is correct.

The Court: Where it says Mr. Basich you meant Mr. Bray?

Mr. Monteleone: Yes. On page 58, line 12, it should be "Up to the time you moved your plant away" and on the line following instead of "hen" is should be "men."

The Court: All right.

Mr. Monteleone: On page 76, line 5, the objection by Mr. McCall, which reads: "May it be understood that we object to all of this deposition, which I understand does pertain," instead of that it

should have read "does not pertain." Is that correct, Mr. McCall?

Mr. McCall: That's right.

Mr. Monteleone: The word "not" should be added after "does."

The Court: All right.

Mr. Monteleone: And on page 78, line 9, it should read "Did he ever give any such orders that you know of?" instead of "Did you ever give any such orders that you know of?" Is that correct, Mr. McCall?

Mr. McCall: Apparently.

Mr. Monteleone: And on page 96, line 12, it reads "E. E. Bressi and B. E. Varda." It should be "Bressi and Bevarda."

In connection with the bill of particulars that had been filed by the plaintiff, and the amendment thereto, in reference to the insurance, in checking over some of the exceptions filed by Mr. McCall we had our auditor recheck, and we find a few more errors, which I will ask the court at this time to credit. Schedule I, page 96.

Mr. McCall: Does the court have before him this document I filed with the clerk?

The Court: Yes, I have a copy.

Mr. Monteleone: Schedule I, if the court please, page 96, there is an item listed, Leslie McDaniel, \$6.00, which is a duplication, and should be eliminated.

Mr. McCall: May I ask if counsel has the page of the exceptions to the bill of particulars, on which that appears?

Mr. Monteleone: No; I am just making my own corrections, Mr. McCall.

The Court: That is the last item?

Mr. Monteleone: Yes. On page 97, Rex McCoy, Maintainer Operator, that is a duplication, \$33.75, so that item should be eliminated, so that instead of the total amount as shown on page 2 of the Bill of Particulars, Schedule I, being \$38,979.65, it should be \$38,939.90.

The Court: All right.

Mr. Monteleone: On Schedule II, page 23, Manuel Billareal, there is an error in that amount in the sum of \$6.12. Instead of the total being \$55.56, it should be \$49.44.

On page 2, where the total is shown in Schedule II, instead of being \$8,240.54, it should be corrected to read \$8,234.42.

Schedule IV, page 8, there is an error of an overcharge of \$26.81, which should be deducted from \$44.69, leaving a balance of \$17.88.

Schedule X, page 1, lines 27 and 28 of that page, if your Honor pleases, there are two items, each referring to Dozer 428, showing a total amount of 12½ hours. That should be corrected to 10½ for the total, thereby eliminating from that total the sum of \$20.40.

The Court: Which item is it?

Mr. Monteleone: Dozer 428, lines 27 and 28; the total of those two items is \$124.90, consisting of \$75.00 and \$45.90. Instead of that, the total should be \$104.50. Instead of working 8 hours and

4½ hours, apparently they worked 8 hours and 2½ hours, or 10½ hours.

On Schedule XIX, page 1, Shovel 108, there is an overcharge. What is the date of that overcharge?

Mr. McCall: That is on page 32 of my memo, but I do not have the date.

Mr. Monteleone: There is a duplication, if the court please.

The Court: \$129.04.

Mr. Monteleone: Yes, there is an overcharge of \$26.81.

The Court: Why do you want to make the change?

Mr. Monteleone: It was an overcharge.

Mr. McCall: The date is June 9, 1945.

Mr. Monteleone: Thank you, Mr. McCall.

Schedule XXI, page 1, in checking over the figures throughout, this corresponds with the check made by the defendant. If the court please, there is an overcharge of \$352.47, so that Schedule XXI, in the front should read \$27,477.07 instead of \$27,809.54.

There is one question, if the court please, we ask to make in connection with the amended bill of particulars, covering the items of insurance. That is Schedule VI, as amended. It shows a total amount of public liability and property damage in the sum of \$611.09.

The Court: What schedule is that?

Mr. Monteleone: VI, as amended. There was an amendment filed at your Honor's suggestion, which

segregated the various items of insurance. From February 17, 1945, to June 9, 1945, totaling \$476.26, charged in connection with public liability and property damage. That amount should be eliminated, and the total in property damage and public liability should be \$134.83 instead of \$611.09, as appears on the second page of this amendment.

Mr. McCall: It is dated August 18.

Mr. Monteleone: All items from February 17, 1945, to June 1, 1945, under public liability and property damage, total \$476.26 should be eliminated, as the policy shows these parties were not covered by public liability. \$611.09 should be changed to \$134.83.

Those are the only changes we ask the court to make at this time. Mr. Popovich, will you take the stand?

GEORGE J. POPOVICH

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. George J. Popovich.

Direct Examination

By Mr. Monteleone:

Q. Mr. Popovich, your full name is what?

A. George Jovan Popovich.

Q. What is your business or occupation?

A. Contractor.

(Testimony of George J. Popovich.)

Q. With Basich Brothers Construction Company, the plaintiff in this matter? A. Yes.

Q. What is your official capacity?

A. Secretary and office manager.

Q. And the office is located where?

A. 600 South Fremont Avenue, Alhambra.

Q. Were you occupying the same position during the year 1945? A. Yes.

Q. What has been your experience in connection with construction work?

A. I have been engaged in construction work for approximately 11 years.

Q. Did you have any experience as an accountant also?

A. Yes, I have had experience as an accountant, and I also passed the Certified Public Accountant's examination in the State of California.

Q. Have you had duties with other contractors in connection with work of a kind similar to the work involved in this action? A. Yes, sir.

Q. Did you have occasion to meet a member of the firm of Duque & Frazzini? A. Yes.

Q. When did you first meet, and who did you first meet of this firm?

A. Mr. Frazzini, when we commenced to negotiate on our contract.

Q. Can you give us approximately when that was? A. I would have to refer——

Q. The contract is dated February 7, 1945?

A. On or about February 6th.



(Testimony of George J. Popovich.)

Q. Had you known either Duque or Frazzini prior to that time? A. No.

Q. To your knowledge had Duque and Frazzini done any work for Basich Brothers prior to that time? A. No.

Q. Did you discuss the terms of the contract which was to be drawn? A. Yes.

Q. Had you heard from Duque & Frazzini prior to the time the contract was drawn, either by telephone or wire? A. Yes.

Q. How did they contact you?

A. They first called by telephone, and I referred them to Mr. Nick Basich. Then we received several telegrams.

Q. After that they came to your office, is that correct? A. Yes.

Q. While Mr. Frazzini was at your office, before the contract was prepared, did you have any discussion with Mr. Frazzini in reference to a bond?

A. Yes, I asked him whether or not he was financially capable. He said he was. I asked him for the name of his bonding company. He gave me the name, and said to call the bonding company on the phone, which we did.

Q. What name did he give?

A. Glens Falls Indemnity Company.

Q. That was before the contract was signed?

A. Yes.

Q. Did you have a conversation with the Glens Falls Indemnity Company at that time?

A. Yes, we talked to them on the phone, and

(Testimony of George J. Popovich.)

Mr. Frazzini talked to them on the phone. We were told they were financially capable, and a bond would be written in their San Francisco office.

Q. Who told you that?

A. I don't know the name of the individual.

Q. Someone at the Glens Falls, Los Angeles?

A. Yes.

Q. Was anything said as to who was to pay the premium on the bond?

A. Yes, Mr. Frazzini insisted, since we were insisting on a bond we would have to pay the premiums, which we agreed to do.

Q. Did he talk to them, or to a representative, on the telephone?

A. Yes, because they sent an invoice to us from San Francisco for the premium on the bond.

Q. Was a discussion had with Mr. Frazzini at that time with reference to the payroll to be made by Duque & Frazzini in connection with the sub-contract, if one was signed at that time?

A. Yes.

Q. What was said?

A. Mr. Frazzini told us that he had started work at the time, and had worked in Nevada. He was unable to take care of the payrolls because of his money being tied up. He insisted on us carrying the payroll, and paying all of the insurance. That was incorporated in a special provision. Mr. Frazzini stated insofar as all of the bills were concerned, he was able to meet them.

(Testimony of George J. Popovich.)

Q. That was the reason that provision was put in your contract?      A. Yes.

Q. You drew the contract, did you not?

A. Yes.

Q. Do you know yourself when Duque & Frazzini first started operations?

A. I don't know.

Q. After the contract was signed, the subcontract, which is introduced in evidence as Plaintiff's Exhibit 1, dated February 7, 1945, was the original of that agreement given to Mr. Frazzini after it was signed?      A. Yes.

Q. As I understand, you prepared the subcontract yourself?      A. Yes.

Q. Did you arrange any system of keeping account of any of the expenses or any moneys paid out in connection with the transaction between the Basich Brothers Construction Company and Duque & Frazzini, while they were operating?

A. Yes.

Q. Will you state what was the system which you adopted in connection with keeping the account and records for that purpose?

A. In reference to the payrolls, Duque & Frazzini submitted weekly payrolls. We took the weekly payrolls and paid the employees. We also kept separate records pertaining to supplies, consisting of parts and miscellaneous express charges. Those were kept separate in our journal books and those were charged to Duque & Frazzini as accounts receivable. We also kept memorandum records show-

(Testimony of George J. Popovich.)

ing the time the equipment was sent over to Duque & Frazzini's work and the time they were released by Duque & Frazzini to us.

Q. Those were records kept in the ordinary course of business?      A. Yes.

Q. In that system you adopted the system usually adopted by contractors in work of that kind?      A. Yes.

Q. In reference to the progress of the work by Duque & Frazzini, were any payments made by Basich Brothers directly to Duque & Frazzini during their entire operation?      A. No.

Q. Aside from paying the payroll and the insurance, as stated in your contract, were there any payments made direct to Duque & Frazzini instead of having the same charged as a charge against Duque & Frazzini?      A. I don't understand.

Mr. Monteleone: Will you read the question?

(Question read by the reporter.)

Mr. Monteleone: I will ask to strike the question.

Q. I notice in the bill of particulars there are certain charges for the rent of equipment from Basich Brothers to Duque & Frazzini?

A. Yes.

Q. Were those merely charges against them for equipment furnished?      A. That's right.

Q. The same also as to supplies furnished them?

A. Yes.

Q. Did you arrange for workmen's compensa-

(Testimony of George J. Popovich.)

tion in connection with the Duque & Frazzini work?

A. Yes.

Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945, to June 9, 1945, showing a total of \$38,979.65, subject to the correction made this morning, will you state from what data or information that item was prepared?

A. The items were prepared from weekly payrolls submitted by Duque & Frazzini.

Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.

The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.

Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.

The Court: So long as the originals are available for inspection, it is not necessary to produce them.

Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.

The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years.

Q. (By Mr. Monteleone): Were those weekly payrolls kept in the ordinary course of your business?

A. Yes.

Q. Were the entries under Schedule I prepared

(Testimony of George J. Popovich.)

by you from original weekly payrolls of Duque & Frazzini?

A. You have reference to Schedule I?

Q. I am referring to Schedule I.

A. This was compiled by Homer Thompson.

Q. Was it under your supervision?

A. It was under my supervision.

Q. Both of you checked the payroll when you prepared the Bill of Particulars? A. Yes.

Q. With respect to the corrections that were made by me this morning, can you state whether or not Schedule I of the Bill of Particulars correctly sets forth each and every item as therein specified, as you incorporated the same from the weekly payroll furnished you by Duque & Frazzini?

A. Yes.

Q. Referring to Schedule II, Payroll, Pioneer Crusher Plant, March 25, 1945, to June 9, 1945, amount \$8,240.54, subject to any corrections that may have been made this morning by myself, will you state to the court from what data or records did you take the items set forth in this particular schedule?

A. They were taken from time cards signed by the employee and approved by Duque & Frazzini's foreman.

Q. Were those time cards kept in the ordinary course of business? A. Yes.

Q. Do the items set forth in Schedule II of the Bill of Particulars correctly set forth all of the items as set forth in the time card?

A. Yes.

(Testimony of George J. Popovich.)

Q. In reference to Payroll, Pioneer Crusher, June 9, 1945, to September 22, 1945, which is under the heading Schedule III of your Bill of Particulars, will you state from what data or records those items were taken?

A. Daily time cards.

Q. And those were time cards made by whom?

A. By the employees and signed by the foreman.

Q. Were they made regularly, every day, in the ordinary course of business?

A. I wasn't on the job at the time that happened. Homer Thompson was office manager.

Q. From your inspection of the daily time cards that purported to be daily time cards, were they kept in the ordinary course of business?

A. Yes, they were.

Q. Considering any exceptions which I may have referred to, which I don't believe I did in this particular matter, this morning, can you state whether or not the items set forth in Schedule III of the Bill of Particulars correctly sets forth each and every item under Payroll, Pioneer Crusher, during the time as indicated, which you had taken from the daily payroll records? A. Yes.

Q. In reference to Schedule IV, P.D.O.C. Crusher, June 3, 1945, to July 7, 1945, in the sum of \$3,250.01, will you state from what records you arrived at the amount of \$3,250.01?

A. From the daily time cards.

Q. From the daily time cards prepared by whom?

(Testimony of George J. Popovich.)

A. The employees and signed by the foreman.

Q. They were turned in to your office after that, is that correct?      A. Yes.

Q. These time cards were prepared in the ordinary course of business?      A. Yes.

Q. In preparing Schedule IV of your Bill of Particulars, from these daily time cards, does the Bill of Particulars correctly set forth the items as contained in the daily time cards?      A. Yes.

Q. Referring to Schedule V Payroll, Hot Plant—Sand, June 9, 1945, to September 22, 1945, in the sum of \$2,888.92, from what records did you arrive at that amount?

A. Daily time cards.

Q. Kept by whom?

A. The employees, and signed by the foreman.

Q. Does your Schedule V of your Bill of Particulars correctly set forth all of the items as you had taken them from the daily time cards?

A. Yes.

Q. Will you explain what was the use of that hot plant at that particular time?

A. Yes, the purpose of the hot plant was to dry out the sand material used in connection with aggregate materials.

Q. Was that sand specified in the subcontract with Duque & Frazzini?      A. Yes.

Q. In connection with Schedule VI, Insurance Compensation, \$5,893.60, will you state how that amount was arrived at?



(Testimony of George J. Popovich.)

A. That was arrived from payments made to the Arizona Industrial Accident Commission, and amounts paid to the Pacific Indemnity Company, and amounts paid to the Arizona Unemployment Commission, and amounts paid to the Federal Government for Old Age and Excise Tax.

Q. Taking the compensation, were those figures checked by any representative of the Arizona Compensation Insurance Company?

A. Yes, Mr. Hutchison, the auditor.

Q. Can you state how the rates were determined?

A. The original classification 5506 was submitted to Duque & Frazzini for observation, and later was changed to classification 1710, because of an error made by the Arizona Insurance Commission.

Q. Is this compensation, workmen's compensation, as set forth in the schedule, confined exclusively to the operation of the work called for under the subcontract of Duque & Frazzini?

A. Yes.

Q. Would you state the same thing was true with the other items of insurance? A. Yes.

Q. From the records you have, would you state that the Bill of Particulars, Schedule VI, correctly sets forth the exact item in reference to each of these matters? A. Yes.

Q. Were the amounts actually paid by Basich Brothers Construction Company on account of the various insurance therein specified? A. Yes.

Q. You have Schedule VII, Equipment Rental, fully operated, Basich Brothers Construction Co.,

(Testimony of George J. Popovich.)

February 12, 1945, to May 19, 1945, \$3,989.41. What is understood in the construction business by "Equipment Fully Operated" when you speak of rental?

A. We speak of rental equipment being fully operated—the contractor must take care of all the labor, fuel, maintenance, and everything else that is necessary to operate the machine to work continuously.

Q. Do you mean the contractor, or the one who owned the equipment?

A. The one that owned the equipment.

Q. So you want to correct your statement?

A. Yes, the one who owned the equipment.

Q. The basis of rental is fixed on what?

A. Hourly basis, in accordance with the O.P.A. regulation.

Q. In connection with Schedule VII, total \$3,989.41, where did you get those figures?

A. From the equipment time cards.

Q. Will you state what kind of time cards were prepared, by whom they were prepared, and what did they show?

A. Yes, each employee operating a piece of equipment prepared a time card, showing the classification and type of work being prepared. It was properly signed by him, and also signed by the foreman.

Q. The Schedule VII of your Bill of Particulars correctly sets forth the amount as set forth

(Testimony of George J. Popovich.)

in your time cards, to which you have just referred?

A. Yes.

Q. Was this equipment used solely in connection with the work of Duque & Frazzini?

A. Yes.

Mr. McCall: I object to that as calling for a conclusion.

Q. (By Mr. Monteleone): So far as your records show? A. Yes.

Q. Did you have anything to do with Duque & Frazzini in connection with the rental of this equipment referred to in Schedule VII, you yourself? A. Not under this schedule.

Q. Upon what was the amount of rental based under Schedule VII? What is the basis of it?

A. It is on O.P.A. rental rates.

Q. In connection with Schedule VIII, Equipment Rental not Fully Operated, Basich Brothers Construction Co., March 29, 1945, to June 9, 1945, \$2,773.86—what is commonly understood in the construction business when you speak of rental of equipment not fully operated?

A. The individual renting the equipment must maintain it and furnish all labor and fuel in connection with the operation of the equipment.

Q. If any parts are to be replaced, is that by the party who rents the equipment?

A. Yes, that is, if they are not of a major nature.

Q. How about replacement?

A. Yes, that is to be paid.

(Testimony of George J. Popovich.)

Q. This equipment not fully operated, rented to Duque & Frazzini, and was it used exclusively in connection with Duque & Frazzini's operations?

A. Yes.

Q. From what records did you arrive at the amount of \$2,773.86?

A. From the time card records, equipment records and memorandums made in books of original entry.

Q. Were those records kept in the ordinary course of your business?      A. Yes.

Q. From those records does the amount that you indicate in Schedule VIII of your Bill of Particulars correctly set forth the amount of \$2,773.86?

A. Yes.

Q. And upon what was the rental amount charged to Duque & Frazzini based?

A. On O.P.A. rental rates.

Q. In connection with your Schedules VII and VIII, rent of equipment fully operated, and rent of equipment not fully operated, those were equipments that were owned by Basich Brothers, is that correct?      A. Yes.

Q. They were rented by Duque & Frazzini, is that correct?      A. Yes.

Q. And on your books you made a charge against Duque & Frazzini for rental, is that correct?

A. Yes.

Q. You have Schedule IX, Equipment Rental Royalty Basis, Basich Brothers Construction Co.,

(Testimony of George J. Popovich.)

\$4,191.60. What do you mean by rental, royalty basis?

A. The amount to be paid depends entirely on the amount of materials produced through the plant.

Q. Was this equipment rented fully operated or not?

A. No, it was not rented fully operated.

Q. Upon what record did you arrive at the figure on Schedule IX, \$4,191.60?

A. From books of original entry, engineers' estimates and engineering figures.

Q. Those estimates were made in the regular course of business?      A. Yes.

Q. Does the amount, \$4,191.60, set forth correctly the amount shown in those records?

A. Yes.

Q. Was this rental equipment used exclusively in connection with Duque & Frazzini's operations?

A. Yes.

Q. Upon what rental basis did you arrive at the amount?

A. The basis submitted by N. L. Basich to him.

Q. To who?      A. Mr. Frazzini.

Q. What was that basis?

A. 10 cents per cubic ton for the Pioneer crusher.

Q. You mean 10 cents per ton?      A. Yes.

Q. In your opinion as a contractor, was that amount a reasonable charge?

A. Approximately 50 per cent less than the O.P.A. rental.

(Testimony of George J. Popovich.)

Q. In other words, you charged about 50 per cent less than the O.P.A. rates?

A. Yes.

Q. In your opinion that would be a reasonable charge? A. Yes.

Q. Was this used solely in connection with the operations of Duque & Frazzini? A. Yes.

Q. Would you state that the charges in Schedule No. VII and VIII of your Bill of Particulars were reasonable charges? A. Yes.

Q. In connection with Schedule X, Equipment Rental Fully Operated, P.D.O.C., February 12, 1945, to May 19, 1945, \$6,902.37; Not Fully Operated, May 9, 1945, to June 10, 1945, \$261.34; upon what were those figures based?

A. They were based on O.P.A. rental rates.

Q. Were these equipments used exclusively in connection with Duque & Frazzini's operations?

A. Yes.

Q. It says that the equipment was fully operated, P.D.O.C. What do you mean by that?

A. P.D.O.C. was the name of a contracting company in Tucson, Arizona.

Q. Did they own the equipment?

A. I would not know.

Q. Did you acquire the equipment from them?

A. I would not know that. They had the equipment. We did not know whether they were the legal owners.

Q. How did it happen that you carried that account on your books? Did you make arrangements with Duque & Frazzini? How did you happen

(Testimony of George J. Popovich.)

to show the equipment charged against Duque & Frazzinin directly by Basich Brothers rather than P.D.O.C.?

A. That was taken care of by Mr. N. L. Basich.

Q. From what records did you determine the amount of \$6,902.37 for the equipment fully operated, in Schedule X?

A. From invoices submitted by P.D.O.C., daily time cards, with the proper approval by the foreman.

Q. The account in your schedule correctly sets forth the charges made by P.D.O.C. for fully operated rental, and also for not fully operated rental, as shown by your records?

A. Yes. I would like to make a statement. N. L. Basich, he took care of some of this, but not all of it. That is, our superintendents on the job, that is, Duque & Frazzini's foremen arranged for some of this equipment owned by P.D.O.C.

Q. If Duque & Frazzini wanted a piece of equipment, they asked you folks to get it for them?

A. Yes.

Q. And then you turned the equipment over to Duque & Frazzini?

A. Yes.

Q. The owners would bill you?

A. That's right.

Q. You would then charge the same against Duque & Frazzini?

A. Yes.

Q. Upon what were the rentals in Schedule X based?

A. O.P.A. rental rate.

Q. In your opinion, were those charges reasonable charges?

A. Yes.

(Testimony of George J. Popovich.)

Q. Did you make any greater charges to Duque & Frazzinin for the rental of these items than were made to you by P.D.O.C.      A. No.

Q. Were these equipments used exclusively in connection with Duque & Frazzini operation?

A. Yes.

Q. In connection with Schedule XI, Equipment Rental Fully Operated by Basich Brothers, J. G. North & Sons, February 21, 1945, to June 6, 1945, \$4,956.06—upon what records did you arrive at the amounts set forth in Schedule IX?

A. J. G. North & Sons invoices and our books of original entry.

Q. Were those invoices furnished you in the ordinary course of business?      A. Yes.

Q. The amounts set forth in the schedule correctly set forth the amount of rental charged by J. G. North & Sons?      A. Yes.

Q. Were these equipments used exclusively in connection with Duque & Frazzini operations?

A. Yes.

Q. Will you explain how it happened that the equipments belonging to J. G. North & Sons were turned over to Duque & Frazzini, if you know?

A. I don't know how they were turned over.

Q. In other words, they were used exclusively by Duque & Frazzini?      A. Yes.

Q. And J. G. North & Sons charged Basich Brothers, and Basich Brothers in turn billed Duque & Frazzini for this equipment, is that correct?



(Testimony of George J. Popovich.)

A. Yes. J. G. North & Sons were under contract with us, under the prime contract.

Q. The equipment in Schedule XI had nothing to do with your prime contract? A. No.

Q. In other words, it was rented by Duque & Frazzini? A. Yes.

Q. Upon what was the amount based set forth in Schedule XI? A. O.P.A.

Q. Did you make any greater charge against Duque & Frazzini under your Schedule XI than was charged against Basich Brothers by J. G. North & Sons? A. No.

Q. Were any of these equipments used exclusively in connection with the Duque-Frazzini operations as distinguished from any Basich operations? A. Yes.

Q. Would you, in your opinion, state that the amount charged in Schedule XI was the reasonable charge? A. Yes.

Q. In reference to Schedule XII, Equipment Rental Fully Operated, B. B. Bonner 4/6/45 to 4/24/45, \$625.74, will you state from what records you base the items set forth in this schedule.

A. B. B. Bonner's invoices and time cards, equipment rental time cards.

Q. Were those invoices and time cards weekly invoices and time cards? A. Yes.

Q. Prepared in the ordinary course of business. A. Yes.

Q. The amount of rental was based upon what? A. O.P.A. rent.

(Testimony of George J. Popovich.)

Q. In your opinion that was a reasonable charge?      A. Yes.

Q. Was this equipment, B. B. Bonner, referred to in this schedule, used exclusively in connection with the Duque & Frazzini job?      A. Yes.

Q. As I understand, it was turned over to Duque & Frazzini by Basich Brothers, and Baasich Brothers were charged by Bonner, and Basich, in turn, charged Duque & Frazzini, is that right?

A. Yes.

Q. Did you make any greater charges against Duque & Frazzini for the rental of this equipment, than were paid by Basich Brothers to Bonner?

A. No.

(Short recess.)

Q. (By Mr. Monteleone): Referring to Schedule XIII, Equipment Rental Not Fully Operated, Bressi & Bevanda, 4/24/45 to 6/9/45, \$582.72. From what records did you arrive at this amount set forth in Schedule XIII?

A. From the original invoices.

Q. Does this correctly set forth what the invoices set forth?      A. Yes.

Q. So far as your records show, this equipment was used in connection with the Duque & Frazzini job?      A. Yes.

Q. On what was the amount of \$582.72 based?

A. On the O.P.A. rental rates.

Q. In your opinion was that a reasonable amount?      A. Yes.

(Testimony of George J. Popovich.)

Q. Was it a greater charge made to Duque & Frazzini on this equipment than was charged against Basich Brothers? A. No.

Q. Did you have anything to do, so far as that particular equipment was concerned, with it?

A. Yes, Mr. Frazzini occasionally called me at the Los Angeles office, and asked for certain types of equipment, and parts and supplies quite frequently. I accommodated him. I found out what certain equipment was available, and certain parts and supplies were available. At this particular time he asked for a generator. I made my arrangement with Bressi & Bevanda, and a generator was released to us.

Q. Bressi & Bevanda made a charge against you, and you made a charge against Duque & Frazzini, is that correct? A. Yes.

Q. So far as you know, this equipment was not used in any manner in connection with Basich Brothers' operations? A. No.

Q. With reference to the equipment set forth in Schedule XIV, Equipment Rental Not Fully Operated, Industrial Equipment Co., 4/6/45 to 5/8/45, \$176.00—upon what records did you arrive at that amount?

A. Original invoices.

Q. Those were kept in the ordinary course of business? A. Yes.

Q. The same way with the Bressi & Bevanda invoices? A. Yes.

Q. Upon what basis was the rental \$176.00 arrived at? A. O.P.A. rental basis.

(Testimony of George J. Popovich.)

Q. In your opinion was that a reasonable charge?      A. Yes.

Q. So far as your records show, this equipment was used exclusively with the Duque & Frazzini job, is that correct?      A. Yes.

Q. Was any greater charge made against Duque & Frazzini than was charged by the Industrial Equipment Co. against Basich Brothers?

A. No.

Q. With reference to Schedule XV, Equipment Rental Fully Operated, Basich Brothers Construction Co., June 9, 1945, to September 16, 1945, \$18,485.17—upon what records were the amounts set forth in that schedule arrived at?

A. From books of original entry and equipment time cards.

Q. Were those kept in the ordinary course of business?      A. Yes.

Q. Does the amount set forth in Schedule XV correctly set forth the amount as shown by those records?      A. Yes.

Q. So far as the record is concerned, were these equipments used exclusively in connection with the work set forth in the subcontract of date February 7, 1945?      A. Yes.

Q. Upon what basis was the amount of rental of equipment fully operated?      A. O.P.A.

Q. In your opinion was that a reasonable charge?      A. Yes.

Q. So far as the records are concerned, were any of these equipments set forth in Schedule XV

(Testimony of George J. Popovich.)

used in connection with any other operation aside from the work specified in the subcontract of date February 7, 1945?      A. No.

Q. In reference to Schedule XVI, Basich Brothers Construction Co., Equipment Rental, Not Fully Operated, June 9, 1945, to September 8, 1945, \$2,849.56—upon what record was this amount arrived at?

A. From the books of original entry and the invoices.

Q. Were those records kept in the ordinary course of business?      A. Yes.

Q. Upon what basis was the amount of the rental arrived at?      A. O.P.A.

Q. In your opinion, was that a reasonable charge?      A. Yes.

Q. So far as your records show, was any of the equipment mentioned in Schedule XVI used on any other work outside of the work set forth in the subcontract of date February 7, 1945?

A. No.

Q. Referring to Schedule XVII, Basich Brothers Construction Co., Equipment Rental, Royalty Basis, \$6,753.20, upon what records was that amount based?

A. From the United States Engineers' records and our books of original entry and our entire records.

Q. What was used as the basis of the royalty—what amount?

(Testimony of George J. Popovich.)

A. They used 10 cents per ton on the Pioneer Crusher.

Q. Does this refer to the Pioneer Crusher?

A. Yes, and 10 cents for the hot plant.

Q. In your opinion, was that a reasonable charge? A. Yes.

Q. From your records can you state whether or not any of the equipment referred to in XVII was used in connection with any other work, outside of the work set forth in the subcontract of date February 7, 1945? A. No.

Q. Referring to Schedule XVIII, Equipment Rental Not Fully Operated, P.D.O.C., June 15, 1945, to September 17, 1945, \$108.50, upon what records, if any, do you base this figure?

A. Original invoices.

Q. Were those kept in the ordinary course of your business? A. Yes.

Q. What was the amount based on?

A. O.P.A. rental.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. So far as the records show, can you state whether or not this equipment was used exclusively in connection with the operation called for under the subcontract of September 17, 1945?

A. No.

Q. It was?

A. Was it used exclusively in connection—

Q. —with that work? A. Yes.

Q. Not in connection with any other matter?

A. That's right.

(Testimony of George J. Popovich.)

Q. In reference to Schedule XIX, Equipment Rental Fully operated, P.D.O.C., June 9, 1945, to September 6, 1945, \$10,412.27, will you state upon what records the amounts set forth were based?

A. The original invoices.

Q. Furnished to you by whom?

A. P.D.O.C.

Q. Were the amounts scheduled correctly based upon those invoices?      A. Yes.

Q. Upon what basis was the rental fixed in Schedule XIX?      A. O.P.A.

Q. In your opinion was that a reasonable rental?      A. Yes.

Q. Will you state whether or not the equipment referred to in Schedule XIX were used exclusively in connection with the operation called for in the subcontract of February 7, 1945?

A. Yes.

Q. They were not used in connection with any other operation of Basich Brothers, is that correct?

A. Yes.

Q. With reference to Schedule XX, Equipment Rental, Royalty Basis, P.D.O.C., \$5,349.73, upon what records did you arrive at that figure?

A. Original invoices by P.D.O.C.

Q. Were the invoices furnished by P.D.O.C. in the regular course of business?      A. Yes.

Q. Upon what basis was the amount arrived at?

A. O.P.A. rental rates.

Q. In your opinion, was that a reasonable rental?

(Testimony of George J. Popovich.)

A. In this particular rate, I did not have anything to do with it. Mr. N. L. Basich made that deal direct, but we have checked it, and that was in accordance with O.P.A. rental rates.

Q. In your opinion was that a reasonable rate?

A. Yes.

Q. So far as the records concerned show, was that equipment used exclusively in connection with the work set forth in the subcontract of February 7, 1945? A. Yes.

Q. In reference to the Equipment Rental, Fully Operated, set forth in Schedule XXI, J. G. North & Sons, June 8, 1945, to September 12, 1945, \$27,809.54, will you relate upon what records the figures set forth in this schedule were based?

A. Original invoices sent by J. G. North & Sons.

Q. Those invoices were furnished to Basich Brothers in the regular course of business, is that correct? A. Yes.

Q. On or about the times the items were incurred?

A. At the end of each month we would receive everything in detail from J. G. North.

Q. Upon what basis was the rental \$27,809.54 made? A. O.P.A. rentals.

Q. In your opinion was that a reasonable rental?

A. Yes.

Q. Do the items set forth in Schedule XXI correctly set forth the amounts you arrived at from these invoices you have referred to? A. Yes.



(Testimony of George J. Popovich.)

Q. From your records can you state whether or not the invoices referred to in Schedule XXI were used exclusively for the operations set forth in the subcontract of February 7, 1945? A. Yes.

Q. Were they in any manner connected *with any* operations? A. No.

Q. With reference to Schedule XXII, Equipment Rental Fully Operated, Phoenix Tempe Stone Co., June 15, 1945, to August 9, 1945, \$6,102.05, upon what was that amount based?

A. Original invoices submitted by Phoenix Tempe Stone Co., and from equipment time cards.

Q. And they were kept in the ordinary course of your business? A. Yes.

Q. Does the amount set forth in Schedule XXIV correctly set forth the amount as shown by those invoices and records? A. Yes.

Q. Can you state upon what the amount of \$6,102.05 was based?

A. On O.P.A. rental rates.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. Will you state, from your records, whether or not the equipment was used exclusively in connection with the work set forth in the subcontract of February 7, 1945? A. Yes.

Q. Was any of it used, do your records show, in connection with any other work? A. No.

Q. In reference to Schedule XXIII, Equipment Rental Not Fully Operated, Bressi & Bevanda,

(Testimony of George J. Popovich.)

June 9, 1945, to September 10, 1945, \$1152.61, upon what records did you arrive at that amount?

A. From Bressi & Bevanda original invoices.

Q. Does the amount in Schedule XXIII correctly set forth the amount as shown by those invoices? A. Yes.

Q. Were those invoices kept in the ordinary course of your business? A. Yes.

Q. Upon what was the amount of \$1152.61, set forth in Schedule XXIII, based?

A. O.P.A. rental.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. From your records state whether or not the equipment referred to in Schedule XXIII was used exclusively in connection with the work set forth in the subcontract of February 7, 1945?

A. Yes.

Q. It was not used in connection with any other work at all, is that correct? A. Yes.

Q. That is, it was not so used, is that correct?

A. Yes.

Q. In reference to Schedule XXIV, Equipment Rental, Not Fully Operated, Martin Construction Co., June 15, 1945, to September 8, 1945, \$270.00, upon what was that based?

A. Original invoices.

Q. That were furnished to you by this concern in the ordinary course of business?

A. Yes.

Q. Upon what was the rental based?

A. Based on O.P.A.

(Testimony of George J. Popovich.)

Q. In your opinion was that a reasonable rental?

A. Yes.

Q. From your records can you state whether or not this equipment was used exclusively in connection with the work specified in subcontract of February 7, 1945?

A. Yes.

Q. It was not used in connection with any other work, is that correct?

A. Yes.

Q. In reference to Schedule XXV, Equipment Rental, Not Fully Operated, Axman-Miller Construction Co., July 6, 1945, to September 17, 1945, \$700.00, upon what, if any, records is this amount based?

A. Upon O.P.A. rental rates.

Q. What records did you use in arriving at it?

A. Original invoices.

Q. Sent to you by the Axman-Miller Construction Co.?

A. Yes. I was going to say one thing. On Schedule XXIV, when you told the Judge, you forgot to mention there was a correction made on that particular charge.

Q. In other words, I understand, Mr. Popovich, so far as your testimony is concerned, if there were any corrections made by me this morning, that will affect your answer?

A. Yes, but you did not mention this particular one.

Q. I did not? A. No.

Q. What correction do you desire to make in connection with that?

(Testimony of George J. Popovich.)

A. This amount should be reduced. I have the records there. It's a matter of some twenty-odd dollars. Seven days at \$45.00 per month, a total of \$21.00 overcharge.

Q. In other words, there was a \$21.00 overcharge in connection with the amount of \$270.00, is that correct?      A. Yes.

Q. The amount should be \$249.00 rather than \$270.00?      A. Yes.

Q. Otherwise, your testimony stands as it, is that correct?      A. Yes.

Q. We are now referring to Schedule XXV, Equipment Rental, Not Fully Operated, Axman-Miller Construction Co., July 6, 1945, to September 17, 1945, \$700.00. Upon what record is that based?

A. Original invoice.

Q. Kept in the ordinary course of business?

A. Yes.

Q. Upon what was the rental based?

A. O.P.A. rental.

Q. In your opinion was that a reasonable rental?

A. Yes.

Q. From your records will you state whether or not this equipment was used exclusively in connection with the work specified in the subcontract of February 7, 1945?      A. Yes.

Q. And not used in connection with any other matter, is that correct?      A. Yes.

Q. In reference to Schedule XXVI, Repairs Made by Others on Basich Brothers Construction

(Testimony of George J. Popovich.)

Co. Equipment, Not Fully Operated, \$275.51. Will you state upon what records these were based?

A. On original invoices.

Q. Were they kept in the ordinary course of business? A. Yes.

Q. Does the amount set forth in Schedule XXVI correctly state the amount as shown by those invoices? A. Yes.

Q. What was used as the basis in arriving at the figure \$275.51?

A. The details presented by the George Audish Welding Shop.

Q. Was that based upon any O.P.A. rate, or was that just billed? A. That was just billed.

Q. In your opinion, was that a reasonable charge? A. Yes.

Q. So far as your records are concerned, can you state what was the kind of these repairs?

A. Repairing the Pioneer Crusher Plant.

Q. That was while it was being operated?

A. We have the original invoices here. You would have to refer to those.

Q. These were replacement parts, is that correct, so far as your records show?

A. Yes, repair parts, or replacement parts.

Q. So far as your records show, can you state whether or not the repairs were made to the equipment while it was being used in the performance of the work called for in the subcontract of February 7, 1945? A. Yes.

(Testimony of George J. Popovich.)

Q. In your opinion do you state that was a reasonable charge? A. Yes.

Q. Now, in connection with Schedule XXVII, Parts Purchased for Basich Brothers Construction Co., Equipment Not Fully Operated, February 14, 1945, to June 4, 1945, \$2,259.88. On what was that figure based?

A. From invoices presented by the vendors.

Q. What is that?

A. Invoices presented to us by the vendors.

Q. Presented to you in the ordinary course of business? A. Yes.

Q. In your opinion were the charges shown on the invoices set forth in Schedule XXVII reasonable charges? A. Yes.

Q. From your records can you state what those parts were used for?

A. In connection with the operation of the crushing plant and repair and replacement parts used in connection with the operation of the crushing plant.

Q. That is, used in connection with the operation of the Pioneer Crushing Plant while being operated by Duque & Frazzini? A. Yes.

Q. Those parts represent replacement parts worn out, is that correct? A. Yes.

Q. I understand it is customary that anyone who rents equipment not fully operated is to make those repairs, is that correct? A. Yes.

Q. In connection with Schedule XXVIII, Parts Taken From Basich Brothers Construction Com-

(Testimony of George J. Popovich.)

pany Stock, \$1,723.85. Upon what was that based?

A. Upon what was that based, did you say?

Q. Schedule XXVIII, Parts Taken From Basich Brothers Construction Company Stock, \$1,723.75. Am I in error there?

A. That is correct. I did not quite understand your question.

Q. I have not asked you a question. I just called this to your attention.

A. Yes, I have it.

Q. Upon what records, if any, did you arrive at the figure \$1,723.75?

A. The figures were arrived at from the books of original entry showing these particular materials and parts were released.

Q. They were required by whom?

A. Duque & Frazzini.

Q. Were they used in connection with any particular equipment, so far as your records show?

A. Yes.

Q. What equipment?

A. They were used for the crushing plant.

Q. That was the one they rented not fully operated, is that correct?

A. I would not know. I would have to refer to the details of this.

Q. I mean so far as your records are concerned?

A. So far as our records are concerned, it was used for the Pioneer, and also our equipment.

Q. Your own equipment?           A. Yes.

(Testimony of George J. Popovich.)

Q. In connection with this operation under sub-contract of February 7, 1945? A. Yes.

Q. In your opinion would you state that the parts furnished by Basich Brothers, for the sum of \$1,723.75 was a reasonable charge? A. Yes.

Q. When you say stock of Basich Brothers, did you happen to have this in your own stock?

A. Yes, we have that tractor in our own stock. They requested parts. We supplied them, and charged them the same price they were charged to us.

Q. In other words, you made no profit in the deal? A. Yes, that is right.

Q. In other words, instead of buying it, you took it from your stock? A. Yes.

Q. You made no additional charge to them?

A. No.

Q. As shown by your invoices? A. Yes.

Q. In reference to Schedule XXIX, for Fuel, Grease and Oil on Equipmentt not Fully Operated, May 9, 1945, to June 31, 1945, \$732.47, upon what was that figure based?

A. From the original invoices submitted to us.

Q. From your records, for what was the fuel, gas and oil used?

A. Used in connection with the operation of the hot plant and other equipment.

Q. Of whom? A. Duque & Frazzini.

Q. Was any of it used in connection with any other operation outside of Duque & Frazzini's?

A. No.



(Testimony of George J. Popovich.)

Q. Upon what was the amount of \$732.47 based, on invoices? A. Yes, on invoices.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. From your records, that was used exclusively in connection with Duque & Frazzini's operation? A. Yes.

Q. Now, you have Schedule XXX, Miscellaneous Labor Invoices, Etc., February 26, 1945, to June 16, 1945, \$2,814.24. On what record did you arrive at the figure \$2,814.26?

A. Books of original entry.

Q. Do the items scheduled in Schedule XXX correctly set forth the amount as shown by your books of original entry? A. Yes.

Q. Are those books of original entry kept in the course, ordinary course of your business?

A. Yes.

Q. Will you state in your opinion whether the amount of \$2,814.24 for the items so specified, was a reasonable charge? A. Yes.

Q. Upon what was that based, O.P.A. rates?

A. That was based on invoices submitted to us, and are labor charges.

Q. From your records would you state that the items set forth in Schedule XXX were used exclusively in connection with the Duque & Frazzini operation under the subcontract of February 7, 1945? A. Yes.

Q. You have Schedule XXXI Freight on

(Testimony of George J. Popovich.)

Rented Equipment, \$326.89. On what records was that based?

A. This was based from our shipping and stock memoranda.

Q. Original records which you made?

A. Yes.

Q. The items on Schedule XXI correctly set forth what your original records show?

A. Yes.

Q. What do your original records show, so far as these items are concerned—what were they for?

A. It showed that certain equipment was transported to Tucson, Arizona, from Los Angeles or elsewhere.

Q. To be used in connection with what operation?

A. Duque & Frazzini's operation.

Q. Exclusively? A. Yes.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. Now, you have Schedule XXXII, Repairs Made by Others on Basich Brothers Construction Co. Equipment Not Fully Operated, June 9, 1945, to September 10, 1945, \$3,969.97. Upon what records was this amount arrived at?

A. From original invoices.

Q. Kept in the ordinary course of business?

A. Yes.

Q. Upon what was that based?

A. That was based on invoices presented to us by the various vendors for work done.

(Testimony of George J. Popovich.)

Q. In your opinion was that a reasonable charge?      A. Yes.

Q. From your records can you state whether or not all of these repairs made were confined exclusively in connection with the work set forth in the subcontract of February 7, 1945?

A. Yes, according to our records.

Q. And in connection with no other work, is that correct?      A. Yes.

Q. In reference to Schedule XXXIII, Parts Purchased for Basich Brothers Construction Co., Equipment Not Fully Operated, June 16, 1945, to September 9, 1945, \$3,215.19, upon what records were those figures based?

A. Invoices submitted to us for payment.

Q. In the ordinary course of business?

A. Yes.

Q. Can you state whether or not the amount set forth in Schedule XXXIII is correct, as shown by those invoices?      A. Yes.

Q. In your opinion was the amount of \$3,215.19 a reasonable charge?      A. Yes.

Q. From your records can you state whether or not the parts purchased in connection with equipment not fully operated were actually used in connection with and exclusively used in connection with the performance of work set forth in *some* contract of February 7, 1945?

A. Yes, according to our records.

Q. In connection with Schedule XXXIV, Parts Taken from Basich Brothers Construction Com-

(Testimony of George J. Popovich.)

pany Stock, \$1,028.91, upon what records was that amount based?

A. From records contained in our books of original entry, such as stock memorandums in our books, showing parts used.

Q. Was that made in the ordinary course of business?      A. Yes.

Q. The amount charged, \$1,028.91, was a reasonable charge?      A. Yes.

Q. From your records can you state whether or not these parts were used in connection, exclusively used in connection with the operation of the work set forth in the subcontract of February 7, 1945?

A. Yes, according to our records.

Q. In connection with Schedule XXXV, Fuel, Grease and Oil on Equipment Not Fully Operated, June 7, 1945, to September 6, 1945, \$1,371.50, upon what records did you arrive at this figure?

A. From records kept by our fuel man and these invoices submitted to us by Petroleum Company.

Q. Were they kept in the ordinary course of business?      A. Yes.

Q. Does the amount set forth in Schedule XXXV correctly set forth the amounts shown on your records?      A. Yes.

Q. In your opinion, is the amount set forth in Schedule XXXV a reasonable charge?

A. Yes.

Q. From your records can you state whether or not fuel, grease and oil on this equipment were used

(Testimony of George J. Popovich.)

exclusively in connection with work performed as specified in the subcontract of February 7, 1945?

A. Yes, from our records.

Q. In connection with Schedule XXXVI, Miscellaneous Labor, Invoices, Etc., from June 7, 1945, to September 17, 1945, \$4,803.15, can you state upon what records the amount set forth in this schedule was arrived at?

A. Yes, from invoices presented to us for payment, and books of original entry.

Q. And they were kept in the ordinary course of business? A. Yes.

Q. In your opinion is the amount set forth in this Schedule XXXVI a reasonable charge?

A. Yes.

Q. From your records can you state whether or not the labor and invoices shown in Schedule XXXVI were used exclusively in connection with the performance of work set forth in the subcontract of February 7, 1945?

A. Yes, according to our records.

Q. I notice in Schedule XXXVI you use the words "Overtime" and "Downtime." What do you mean by that?

A. As I mentioned before, J. G. North had a contract with us, and our prime contract—in drawing up the agreement we stated in the event trucks were kept, and worked on the job, and we were unable to use them, or Duque & Frazzini were unable to use them, so much was to be paid for labor only; not for the use of the trucks. To arrive at these

(Testimony of George J. Popovich.)

amounts, by taking into consideration the time the plant was down——

Q. I want to know what they mean.

A. Overtime for labor in excess of 8 hours work, and downtime was the time the equipment was not in use, and we had to pay for labor.

Q. Schedule XXXVII, Freight on Rented Equipment, \$663.39, upon what was that based?

A. Based upon the original invoices received by us, and also the Railroad Commission freight rate.

Q. That was kept in the ordinary course of business? A. Yes.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. From your records can you state whether or not freight on rented equipment was equipment used in connection with, and used exclusively in connection with the Duque & Frazzini work, set forth in the subcontract of February 7, 1945?

A. Yes, from our records.

Q. In connection with Schedule XXXVIII, Production Gravel Base, \$25,191.44, upon what records was this production based to arrive at the figure set forth in the Bill of Particulars?

A. That was arrived at from engineering estimates, our engineer's records and other records.

Q. Were those records kept in the ordinary course of business? A. Yes.

Q. Does the amount set for in this schedule set forth the amounts as shown by those records?

A. Yes.

(Testimony of George J. Popovich.)

Q. In connection with Schedule——

A. On Schedule XXXVIII you forgot also to mention there was an error.

Q. What error was that?

A. On Schedule XXXVIII the estimate dated June 15, 1945, which shows 567 cubic yards, which is the quantity shown on this exhibit, should read 457 cubic yards, instead of 567. Therefore the total of 54,750 cubic yards, is correct, and agrees with the United States Engineers' final estimate.

Q. Referring to Schedule XXXVIII, what correction would you make? You have \$25,191.44.

A. The total is correct, but one of the items, line 13, dated June 15, 1945, 567 cubic yards, that should be changed to 467 cubic yards.

Q. Is the total amount of cash correct?

A. Yes.

Q. In reference to Schedule XXXIX, Production Gravel Stabilized Base, \$4,109.20, upon what records were they based?

A. Upon engineers' quantities.

Q. Were they kept in the ordinary course of business?      A. Yes.

Q. The amounts set forth in these items correctly show what the engineers' reported estimate is, is that correct?      A. Yes.

Q. With reference to Schedule XXXX, Production Gravel Embankment, \$4,719.60, upon what records was that based?

A. Engineers' estimates.

(Testimony of George J. Popovich.)

Q. Was that kept in the ordinary course of business of the operation? A. Yes.

Q. These items correctly set forth the amount set forth in the engineers' estimate? A. Yes.

Q. Schedule XXXXI, Production Concrete Aggregate, \$70,710.52, upon what records was that based? A. Engineers' estimates.

Q. Was that kept in the ordinary course of business? A. Yes.

Q. Does the amount set forth in this Schedule XXXXI correctly show what is shown in the engineers' estimates? A. Yes.

Q. On Schedule XXXXII, Production Mineral Aggregate, \$15,377.93, upon what records was that based? A. On engineers' estimates.

Q. Was that correctly kept in the ordinary course of business? A. Yes.

Q. Does this amount shown on Schedule XXXXII correctly set forth the amount shown on the engineers' records? A. Yes.

Q. Schedule XXXXIII, Production Concrete Aggregate for Structures, \$405.30, upon what records was that based? A. Engineers' records.

Q. Does the amount set forth in Schedule XXXXIII correctly show the amounts set forth in the engineers' records? A. Yes.

Q. Were those engineers' records kept in the ordinary course of business? A. Yes.

Q. Schedule XXXXIV, Miscellaneous Credits, \$1,319.86, upon what was that based?

A. From engineers' records.



(Testimony of George J. Popovich.)

Q. Miscellaneous credits?

A. Yes, from engineers' records and invoices submitted to individuals that obtained this material.

Q. Does this amount correctly set forth the amount shown on those records? A. Yes.

Q. And those records were kept in the ordinary course of business? A. Yes.

Q. In computing the dollars and cents, did you use as a basis the amount as specified in the subcontract for allowance? A. Yes.

Mr. Monteleone: That is all.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m.)

Los Angeles, California

Tuesday, February 4, 1947, 2:00 p.m.

GEORGE J. POPVICH

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Monteleone:

Q. Mr. Popovich, based on all of the records kept in the ordinary course of business by Basich Brothers in connection with the performance of the requirements contained in the subcontract of date February 7, 1945, introduced in evidence as Plaintiff's Exhibit 1, can you state whether or not the

(Testimony of George J. Popovich.)

Bill of Particulars, and the amendment thereto, referred to in the previous testimony, subject to corrections which were made, as has been testified or explained to the court, contains a full, true, complete and accurate statement of all of the charges and credits in connection with that particular matter?           A. Yes, sir.

Mr. Monteleone: That is all.

#### Cross-Examination

By Mr. McCall:

Q. Mr. Popovich, were you ever on the job at Tucson, Arizona?           A. No.

Q. Then all the information or testimony you have given here, you got it from records submitted to you by someone else, is that right?

A. From someone else's records, and records we kept in the home office.

Q. And the records which you kept in the home office were in turn taken from records given to you by somebody else in Tucson, is that right?

A. Yes, and also submitted by the home office to Tucson.

Q. I believe you said, in connection with Schedule I, that the information which you used to make up that schedule was taken from payroll sheets which you have in court?           A. Yes.

Q. Do you have those before you?

A. Yes, we do.

Q. How many payroll sheets do you have making up Schedule I?

(Testimony of George J. Popovich.)

A. We have all payroll sheets from the beginning of the job, January 29th to October 13, 1945.

Q. To what date in October?

A. The 13th.

Q. Your last record then was October 13, 1945?

A. That is the date the job was finished.

Q. The first payroll record was January 29?

A. Beginning with January 29.

Q. Can you look at your records and tell when you made the first charge against Duque & Frazzini?

A. Commencing with the period February 11 to February 17, the first week that we commenced.

Q. How many time sheets do you have for Schedule I?

A. Well, sir, we had all of them. There was all together, starting with 1—we have a grand total of 37 weekly payroll sheets.

Q. And those are not all relating to Schedule I of your Bill of Particulars?      A. Correct.

Q. You are unable to state then how many payroll sheets you used in making up Schedule I?

A. I don't quite follow you there, sir.

Q. In making up Schedule No. I of your Bill of Particulars, I understood you to testify in your direct examination this morning that the payroll sheets were the basis of your information in making this up.      A. Yes, sir.

Q. Will you refer then to the first payroll sheet that you have, which is from February 11 to 17, you state.

A. All right. Do you have reference to our pay-

(Testimony of George J. Popovich.)

roll sheet or Duque & Frazzini's payroll sheet? We have both of those here.

Q. Which did you use in making up Schedule No. I?

A. Payroll sheets and time cards as submitted by Duque & Frazzini.

Q. That is, to make up your Schedule No. I?

A. Yes, sir.

Q. Do you have the time cards in court?

A. We have some here, but we did not bring them all.

Q. Will you show me the payroll sheet from February 11 to February 17, please?

A. Yes, we have it right here. That is the one presented to us by Duque & Frazzini, and here are both of them.

Q. This weekly payroll sheet that represents time covering the term from February 11, 1945, to February 17, 1945, Sheet No. 1, or two sheets, Payroll No. 3, does this weekly payroll sheet contain the employees only who worked on the subcontract for that week?

A. That contains the subcontractors and our employees.

Q. Plus your employees too? A. Yes.

Q. The employees on this sheet then are the employees on the general job, the entire job?

A. Yes, with the proper segregation made on the distribution sheet for the various charges.

Q. And they are listed in alphabetical order, are they not? A. Yes, they are supposed to be.

(Testimony of George J. Popovich.)

Q. Would you point out to counsel and the court where the segregation is made for the employees for Duque & Frazzini?

A. Yes, we have Duque & Frazzini shown right here, account No. 7, which represents accounts receivable charges, Duque & Frazzini.

Q. From what information, Mr. Popovich, did you make this segregation?

A. That was made from Duque & Frazzini payrolls submitted to us, plus time cards.

Q. Were the payrolls and time cards submitted to you, or someone else?

A. That was submitted to the home office. That was the original payroll of the job, which was submitted to the home office.

Q. This payroll they submitted to the home office is the only thing that you saw?

A. Yes.

Q. You did not see timecards therefor too?

A. I did see the time cards, in making the audit with Homer Thompson.

Q. This sheet on top attached, is that the weekly payroll of Duque and Frazzini?

A. Only that time sheet represents a payroll distribution, classifying the distribution of the various types of operation and work, including Duque & Frazzini accounts receivable, subcontractor.

Q. You do not have the payroll then of Duque & Frazzini separate from the other payrolls?

(Testimony of George J. Popovich.)

A. Yes, we do, from Duque & Frazzini payroll sheets. This information is exactly set forth in our payrolls.

Q. Would you show me then, Mr. Popovich, the weekly payroll sheet which you received from Duque & Frazzini, please? Which is the payroll sheet which you received from Duque & Frazzini? What you have handed me is comprised of many sheets.

A. These represent each weekly payroll sheet.

Q. For Duque & Frazzini only?

A. For Duque & Frazzini only. This is the sheet that was turned over to our office manager, Homer Thompson, by Duque & Frazzini.

Q. I understood you to say that you had weekly payroll sheets covering the time from February 11 to February 17, for Duque & Frazzini. Can you point them out for us?

A. I had the payroll sheet from February 11 to February 17?

Q. Yes.

A. That's the one on top. That is the sheet that our field office received.

Q. Does that include the second sheet next to it?

A. Yes, sir, he has received all these sheets. These were made up by Duque & Frazzini.

Q. They cover from February 11 to February 17?

A. And also other weekly payroll sheets.

Q. Can you show us where are the names of the employees, submitted by Duque & Frazzini?

(Testimony of George J. Popovich.)

A. On the left-hand column of each sheet, it shows the last name and the first name.

Q. The sheet next to that, this large weekly payroll sheet, where did this come from?

A. Duque & Frazzini.

Q. And that covers only the employees of Duque & Frazzini?

A. You have particular reference to the one ending March 10?

Q. From the 17th of February to March 10.

A. This is the one you have particular reference to, isn't it, sir?

Q. Would you read the question again to the witness?

(Question read by the reporter.)

Mr. Monteleone: Mr. McCall, you pointed out a certain document to the witness. He is wondering whether you specified the particular document you are referring to.

Mr. McCall: I will try to frame it more intelligently then.

Q. Mr. Popovich, the large sheet that you hold next to you there, does that contain employees only of Duque & Frazzini, or others too?

A. As explained to you, this contains Duque & Frazzini. We also have time cards representing Duque & Frazzini, but we don't have all the time cards here.

Q. Does this contain Duque & Frazzini's employees only?           A. This sheet here?

Q. Yes.           A. Yes.

(Testimony of George J. Popovich.)

Q. No other employees except those who worked for Duque & Frazzini?

A. As explained, there were time cards also for Duque & Frazzini, but they are not included here.

Q. The employees mentioned on the time cards for Duque & Frazzini are not included here?

A. We have other time cards that might not be Duque & Frazzini payroll. This is one portion. We have another portion we did not bring all the time cards up, but, however, we do have some time cards that represent the payroll of Duque & Frazzini.

Q. As I understand it, Mr. Popovich, the payroll sheets that you have before you there, from which you made up Schedule No. 1 of your Bill of Particulars, show the name of the employee and the amount of his wages, is that right?

A. Yes, sir.

Q. Now, where is Jack Brown shown on your payroll sheet?

A. For the week ending March 10, shown here.

Q. Is it shown prior to that?

A. I would have to look at the previous payrolls to determine that. You have reference to March 17. I have it here, sir. Here is Joe Brown.

Q. From this payroll sheet you say that you made up Schedule No. 1?      A. Yes, sir.

Q. Then how did you segregate——

A. The time cards?

Q. Then how did you segregate these employees



(Testimony of George J. Popovich.)

shown in Schedule I, say Jack Brown and Jack L. Brown?

A. How did we segregate them, sir?

Q. Yes, how could you tell that they were Duque & Frazzini's employees?

A. By the time cards submitted to the field office and weekly payroll sheets submitted to the office.

Q. Where are the weekly payroll sheets?

A. These are the ones.

Q. This is the weekly payroll sheet for the period from March 11 to March 17?

A. Yes, sir.

Q. Do you know who made up this sheet?

A. Who made it up, sir?

Q. Yes.

A. No, Homer Thompson was field office manager.

Q. He made it up?

A. No, Duque & Frazzini made this up, and they were presented to him.

Q. Do you recognize the handwriting as being that of Duque or Frazzini?

A. I don't know. I never checked their handwriting.

Q. That was just the information that was given to you?      A. Yes, sir.

Q. Did you ever see the time cards prepared by Duque & Frazzini?

(Testimony of George J. Popovich.)

A. Did I ever see the time cards prepared by Duque & Frazzini?

Q. Yes.

A. No, sir, I never was on the job.

Q. Or on Schedule No. 1?

A. I wasn't on the job. I didn't see them prepared.

Q. So you don't know whether there are any time cards on Schedule No. 1 or not, do you?

A. I didn't find time cards. Those from the weekly payroll sheets show that there are time cards and weekly payroll sheets from Duque & Frazzini.

Q. This which purports to be the weekly payroll sheet is the regular payroll sheet that was used by the Basich Construction Company on all of its jobs?

A. That's right, our regular forms, yes, sir.

Q. I will ask you to look at that payroll sheet from February 17th to March, and state if it is signed by either Duque or Frazzini?

A. What dates were those, sir?

Q. From February 17 to February 24?

A. I don't see any signatures on the payroll.

Q. Will you read them?

A. Will I read them?

Q. Will you state to the court, Mr. Popovich, if you can find the signature of Duque or Frazzini on any of the payroll sheets?

A. I would have to go through all of these. I have many time cards here showing the signature of Duque & Frazzini.

(Testimony of George J. Popovich.)

Q. Isn't it a fact, Mr. Popovich, that none of the weekly payroll sheets were ever signed by Duque or Frazzini?

The Court: So far as you know, from the evidence before you?

A. Yes, I would have to check these. These were the ones presented to us, which show Duque & Frazzini's name, but whether or not it was their handwriting I would not know. These were presented to our field office, to the manager, Homer Thompson.

Q. Have you a time card in front of you which has the signature?           A. Yes, sir.

Q. Of anyone?

A. Here is Mr. Duque, Duque, Duque, Frazzini.

The Court: Do you want to look at some of these exemplars here?

Mr. Monteleone: I notice this is dated May 9. Do you have any from February?

A. We haven't checked them all, sir. I would have to go through all the time cards to answer that.

Q. (By Mr. McCall): It appears these are all for May and for June.

A. There are some here for May, June, and, as I mentioned to you, we have other time cards also which we did not bring with us.

Q. Mr. Popovich, do you have a weekly payroll sheet covering the time from February 24 to March 3rd?

A. Yes, sir, we have the original payroll sheet here. The week ending February—do you have reference to the week ending February?

(Testimony of George J. Popovich.)

Q. No, from February 24 to March 3rd.

A. February 24 to March 3rd. Here is the home office original payroll sheet.

Q. Is this large sheet from February 25 to March 3rd the original payroll sheet?

A. The original payroll sheet sent to the home office by the field office.

Q. And it includes all the employees of both Basich Brothers Construction Co. and Duque & Frazzini?      A. Yes.

Q. It includes those in alphabetical order?

A. Yes.

Q. What do you have here that would indicate any of these employees worked for Duque & Frazzini on the subcontract?

A. We have records to support the charges made against the subcontractor, Duque & Frazzini. Those records were compiled from the daily time cards and weekly payroll sheets that were submitted to our field office.

Q. Do you have the weekly payroll sheet that was submitted for this particular time?

A. We have the weekly payroll sheet. However, we don't have all the time cards.

Q. Would you exhibit the weekly payroll sheet for the time from February 25 to March 3rd?

A. Our payroll sheet last year?

Q. Would you exhibit that to the court?

A. Yes, sir.

Q. What you have just shown to the court there

(Testimony of George J. Popovich.)

is a record which was furnished to you by your home office, is that right?      A. Yes, sir.

Q. It does not purport to cover the subcontract employees only; it covers all employees on the job?

A. Yes, sir, with the proper notation on them, of the labor for Duque & Frazzini.

The Court: I think we ought to identify this. It is a document which I do not feel like taking away from your records. The Income Tax Department might want to see it some time. Let us identify it by saying there is presented to me three large sheets entitled: Weekly Payroll Sheet, called Payroll No. 5, Job 19, at Tucson, which list alphabetically the names of the employees, and the capacity in which employed, the hours they work each day of the week, the total of hours, the rate of pay, gross wages, Federal Old Age Tax, total deductions, net amount due, and Check No. so and so.

Then in front of it is the distribution sheet entitled: Payroll Distribution. Which distributes the wages as paid to various activities, such as removing, miscellaneous utility, excavation, grading, scarifying, and so forth. Also the names of persons or firms for whom these accounts were paid: Duque & Frazzini, J. G. North, F O A. Payroll distribution. Each one of these weekly sheets has in some form or other a payroll distribution attached to it?

A. Yes; those are the detailed records that this was made up on.

(Testimony of George J. Popovich.)

Q. After you make up this payroll sheet—shall we call it the master sheet?      A. Yes, sir.

Q. Then you attach to it the distribution sheet which allows you to charge to various departments of your own, and to other persons to whom you have advanced the money, the particular amount?

A. Yes.

Q. My question is, do all your other payroll sheets have such distribution sheets attached to them?      A. Always.

The Court: I think that is description enough.

Q. (By Mr. McCall): Then, Mr. Popovich, this distribution sheet was made by whom?

A. Made by the field office, Homer Thompson.

Q. Did you have before you the payroll data from which it was made?

A. Yes, sir, we did have Duque & Frazzini's weekly payroll sheets. However, we don't have all the time cards available here.

Q. Will you exhibit to the court now the information from which you made this distribution sheet which you just showed the court?

A. This distribution sheet here?

Q. Yes.

A. We don't have all that information here, sir.

Q. Do you have any of it here?

A. May I ask Homer Thompson if we brought any of that?

Q. If you don't know it of your own knowledge.

A. We don't have it here. We have so many files—about 15 or 20 files made up on this job.

(Testimony of George J. Popovich.)

Mr. Monteleone: You have seen them, Mr. McCall.

Q. (By Mr. McCall): I show you what purports to be a memorandum to the defendant Glens Falls Indemnity Company, regarding plaintiff's Bill of Exceptions, which I hand to you, and I will ask you if you have seen that before?

A. Yes, sir.

Q. Beginning with page 1 there, which says: Page 1 of Bill of Particulars, on the left-hand side; then we have the name Jack Brown, tractor driver, and 3/17/45, Saturday, time card recorded 8½ hours, was paid for 11 hours, overpaid 2½ hours, \$5.62. Did you check that to see if it corresponded with your records?

A. The time card, sir?

Q. Yes.

A. We have no knowledge of any time cards. We have never seen them. Duque & Frazzini's payroll sheet, submitted to us, showed 11 hours Saturday work, March 17th. He was paid for 11 hours.

Q. Where is the time card, or the information from which you got the 11 hours?

A. Duque & Frazzini's weekly payroll sheet.

Q. Where is the 11 hours shown on Duque & Frazzini's weekly payroll sheet?

A. Here, sir.

Q. Isn't that the sheet that was made by someone other than Duque & Frazzini?

A. This weekly payroll sheet was submitted by

(Testimony of George J. Popovich.)

Duque & Frazzini to Mr. Homer Thompson, our office manager.

Q. Do you know of your own knowledge that this individual sheet was prepared by Duque & Frazzini?

A. I was not on the job. I would not know, sir, but from the records submitted to Homer Thompson, and I verified it with the payrolls, and the moneys paid, they are correct, sir.

Q. You have no further information to support that? A. That's right.

Q. I show you what purports to be a time card. On the card it reads: Basich Brothers Construction Company. Time card for 3/14/45. Name J. L. Brown, and I will ask you *have ever* seen that time card before. A. No, sir.

Q. Do you know if it is signed by Jack Brown?

A. I don't know his signature.

Q. How many hours does it show?

Mr. Monteleone: I object to that, if the court please. There is no proper foundation laid that this man has ever seen this type of card.

The Court: I think he can look at it and see what it contains.

Mr. Monteleone: If your Honor please, may I call the court's attention to the deposition of Mr. Frazzini that was taken here? Probably the court has not had time to read it.

The Court: I did not have an opportunity.

Mr. Monteleone: Let me read this portion from



(Testimony of George J. Popovich.)

page 42. These were questions I asked Mr. Frazzini, whom I had never seen before:

“Q. Incidentally, what did you do by the way, with the time cards after they were prepared by you or under your supervision?

In other words, the daily time cards were converted into weekly payrolls submitted to Basich Brothers.

“A. Segregated them into boxes for time periods.

“Q. And did you prepare a payroll from those time cards?

“A. I did not do so personally.

“Q. Who did?

“A. I believe that if any were prepared that they would be by Mr. Duque who was preparing the payroll cards.

“Q. I see. And when those payroll cards were prepared by Mr. Duque, what was done with those cards?

“A. They were put into boxes and kept in our office.

“Q. Were any of them given to Basich Brothers Construction Company?

“A. Not to my knowledge.

“Q. Do you know what became of those payroll cards?      A. I do.

“Q. Where are they?

“A. I gave them to Mr. John Bray of the Glens Falls Indemnity Company for checking and auditing.

(Testimony of George J. Popovich.)

“Q. When did you give these payroll cards to Mr. Bray?

“A. As near as I can remember, I would say some time last fall.”

If your Honor pleases, Mr. McCall apparently had these time cards at the time Mr. Basich’s deposition was taken, and had an opportunity to call them to Mr. Basich’s attention.

The Court: I think they can show by comparison what was on the time cards, because some time cards have shown up. Go ahead. Overruled.

A. We have never had time cards at all, sir. That is, we have never seen those time cards.

The Court: Before now?

A. That’s right. The only thing we went by was given to us by Duque & Frazzini.

Q. Whether that shows a correct reflection of the time cards or not, you don’t know?

A. No.

Q. Somebody may have made a mistake?

A. Yes.

Q. Duque & Frazzini handed you the sheet?

A. Yes. That was on the sheet, 11 hours, and we paid 11 hours.

Q. (By Mr. McCall): Then I will ask you to look at that memorandum relative to plaintiff’s Bill of Particulars, from page 1 to page 15, which covers——

A. Is that Schedule I?

Q. Plaintiff’s Schedule I?                      A. I have it.

(Testimony of George J. Popovich.)

Q. —which purports to cover the difference in time on Schedule 1? A. Yes, sir.

Q. I will ask you if you have ever seen any cards, or any of these names—time cards?

A. Well, sir, I made a detailed audit of the questions you have asked. They came to me. The dates specifically I can't tell you, because I have got about 50 pages, and I couldn't point out any particular one.

Q. You do not on the first 15 pages then find any errors in your Bill of Particulars which are mentioned here?

A. Well, sir, I have all the answers for all your questions here. I will have to refer to each sheet.

Mr. Monteleone: Mr. McCall, there were certain items in your exceptions that I corrected this morning. Subject to the correction made this morning.

Q. (By Mr. McCall): Subject to the corrections made this morning?

A. Well, sir, I don't know of any, unless I refer to my working papers in detail.

Q. Outside of corrections you made this morning, you would say you have not seen any information to support the entries mentioned from pages 1 to 15?

A. I did not see any other papers except the daily time cards and the weekly payroll sheets.

Q. Some of these items mentioned on page 15 I notice were corrected by counsel this morning?

A. Yes, sir.

(Testimony of George J. Popovich.)

Q. On Schedule No. 2, Mr. Popovich, can you tell the Court what Schedule No. II covers in your Bill of Particulars?

A. Yes, sir, No. II covers Pioneer crushing operation from March 25 to June 9.

Q. Then, will you look at the name Hutchins, on page 3 of Schedule II. He is listed as a welder, but was paid \$1.75 regular time, and \$2.625 overtime. Do you have that before you?

A. Yes, sir.

Q. Do you have the welders' rates before you?

A. I do not. I did not bring the rates with me, sir.

Q. Do you know whether or not he was paid the rate of \$1.375 regular time, and \$2.0625 overtime, or \$2.25 overtime for that day? Do you know whether he was paid it or not?

A. I have checked the payroll, sir, and found we paid him \$1.75. Duque & Frazzini borrowed this employee from us, and we always paid Mr. Hutchins \$1.75 an hour for straight time, because he was considered a foreman.

Q. Then since you have looked over the comments here on Schedule II—is that Manuel Villareal? A. Did you say page 18, sir?

Q. Yes.

A. I don't have anything on him.

Mr. Monteleone: There was a correction made on page No. 23.

The Witness: What page?

Mr. McCall: Page 18 of your comments on the

(Testimony of George J. Popovich.)

Bill of Particulars, and it is on page 23 in the Bill of Particulars. A. Yes, I have that here.

Q. The information given in our statement is correct on that, isn't it?

A. Sir, this shows an overcharge in the amount of \$6.12 was made. Therefore, the correct charge should have been \$49.44 instead of \$55.56. I thought Mr. Monteleone brought that out.

The Court: He wants to know, other than that correction, do you have any others as to which you admit an error? A. We might have.

Q. (By Mr. McCall): On Schedule II you have all the cards on that schedule, have you not?

A. We have those cards that were presented to us by Duque & Frazzini, and the weekly payroll sheets presented to us by Duque & Frazzini. I don't think we have all the time cards. We have some of the cards. They are all at the office, those that we don't have here.

Q. Schedules I to V represent the payrolls of Duque & Frazzini, do they not?

A. Schedules I and V?

Q. Of your Bill of Particulars.

A. It all has reference to Duque & Frazzini. Schedule II has, Schedule III has, Schedule IV has, and Schedule V has reference to Duque & Frazzini.

Q. Do you have before you Schedule No. II, Mr. Popovich? A. Yes, sir.

Q. What is that schedule for?

(Testimony of George J. Popovich.)

A. Schedule II is payroll for Pioneer Crusher from March 25, 1945, to June 9, 1945.

Q. Can you tell the court why this payroll for the Pioneer Crusher was kept separate from the payroll shown in your Schedule No. 1?

A. I don't know.

Q. Do you recognize these employees in Schedule II as old employees of Basich Brothers Construction Co.?

A. We have so many of them. Hutchins I know is; I know Lew Stephenson. It is hard for me to say just who I know, because we have had three or four hundred men working for us on different projects.

Q. Paul Albino, mentioned in the first line of Schedule II, is that an old employee?

A. He worked for us off and on. Not steady, though.

Q. How many years had he been working for Basich Brothers?

A. I would not know, sir. I would have to refer to our records.

Q. Then in your comments, from page 16 to page 19, regarding Schedule II, in which the men are paid higher than their ratings called for, do you know why they were paid higher than the rating?

A. They were paid according to the weekly payroll sheet submitted to us showing the rates Duque & Frazzini sent to us.

(Testimony of George J. Popovich.)

Q. The weekly payroll sheets show the rate?

A. Yes, sir, they do have the rates.

The Court: When you loaned an employee to them, you paid them regardless, whether it was the current rate or not?

A. Yes, sir, whatever our men received, if they were borrowed they were paid the same rate that we paid them.

Q. (By Mr. McCall): Mr. Popovich, will you exhibit to the court the payroll sheets on Schedule No. II?

A. You will have to be more specific, because there are a lot of payrolls here.

Mr. McCall: Will you please read the answer, just prior to this one, showing what Schedule No. II was made up from?

(Record read by the reporter.)

Mr. Monteleone: Have you got Schedule No. II?

A. I have it.

The Court: That is 3-25-45 to 6-9-45. Pioneer Crusher?

A. Yes. That was made up from my weekly payroll sheets and daily time sheets that were presented to us.

Q. (By Mr. McCall): Will you exhibit to me please, Mr. Popovich, one of the weekly payroll sheets on Schedule II?

A. They cover a period from March 25 to June 9th.

Q. Yes.

(Testimony of George J. Popovich.)

A. We have one here from May 20 to May 26. That's our original payroll sheet.

Q. None of these which you have exhibited to me, which you call your original payroll sheets, was submitted to you by Duque & Frazzini, was it?

A. Sir, here are weekly payroll sheets submitted to us by Duque & Frazzini. Also we have daily time cards sent to us by Duque & Frazzini.

Q. Time cards on Schedules I or II?

A. We have weekly payroll sheets, and we also have daily time sheets to support any charges made to Duque & Frazzini. They were either on the daily time cards, or they were on the Duque & Frazzini weekly payroll sheets.

Q. Then would you show me, please, Mr. Popovich, the weekly payroll sheets from which this master sheet was made up?

A. Yes, here is the weekly payroll sheet. I don't think we have all the daily time cards with us, but we do have some of them here, sir.

Q. What is there on that that you can tell that it is made up of Schedule No. II?

A. Well, sir, we have sheets where this has been taken into consideration and posted on it, our weekly payroll sheets.

Q. Referring to your bill of particulars on Schedule No. 2, will you show the court just how you took it off of these records, and put it on your bill of particulars?

A. We did not bring all of our accounting working papers up here, which we used, but we



(Testimony of George J. Popovich.)

did have a segregation of the labor charges of Duque & Frazzini, but we would have to have all the working papers here to answer the question.

Q. You are not able to exhibit here how you made up Schedule No. II from the records you have here in court today.

A. Homer has some time cards, but we do not have all of them because, as I said, we have so many files it would be impossible. Here are the daily time cards signed by the employee, and approved by Duque & Frazzini's foreman.

Mr. Monteleone: What schedule is that one, Mr. McCall?

The Court: How can you tell, by the date?

A. I can tell by the date, sir. See right here. You would have to point each particular thing out, so we could support them, because it is impossible to pick them out of the air.

Q. Mr. Popovich, I believe you stated to the court that the payroll sheet on Duque & Frazzini covers Schedule No. II, is that correct?

A. I stated, sir, that the weekly pay roll sheets, together with daily time cards, represent charges in Schedule II.

Q. Mr. Popovich, is it not a fact that you do not have any payroll sheets from Duque & Frazzini covering Schedule No. II?      A. Sir?

Q. Is it not a fact that you do not have any payroll sheets covering Schedule II?

A. Well, sir——

Q. That is, made up by Duque or Frazzini?

(Testimony of George J. Popovich.)

A. Sir, all of this information was taken from Duque & Frazzini's daily time cards, plus weekly pay roll sheets. All factors were taken into consideration to arrive at the charges appearing on Schedule I. We worked with both of them. We have everything here. There is no distinction made as to who prepared them for Duque & Frazzini. They are all considered Duque & Frazzini time cards and weekly payroll sheets. We did not make any distinction. They are here. Your time cards and your weekly payroll cards, all of this data was to make up the weekly payroll and accounts receivable by Duque & Frazzini.

Q. Did you make any distinction between the data that you used to make up Schedules I and II?

A. Did we make a distinction?

The Court: Did you make any distinction between the data used between I and II?

A. We used all this data to compile this. That is the detail of all the particulars here. It was necessary to use all the data we received from Duque & Frazzini.

Q. Since you have these records before you, Mr. Popovich, can you illustrate to the court how you went about to make up Schedule I or Schedule II of your Bill of Particulars from that data?

A. We don't have the working papers with us. I transposed this data onto the working paper to show the distribution or segregation. However, we do have them at the office.

Q. So you cannot illustrate to the court how

(Testimony of George J. Popovich.)

you used this data in making up your Bill of Particulars?

A. We don't have all the necessary data to do that.

Q. You referred to your working sheets as to the data, Mr. Popovich. What kind of material is that?

A. Well, sir, to make this accounting for the Pioneer Crusher, that was carried separately. That distinction apparently was made on the accounting distribution for a reason I don't know. But all the men that were performing on the Duque & Frazzini operation, they were charged on the accounts receivable, subcontractor, Duque & Frazzini. Mr. Homer Thompson has compiled that data, and I have made that distinction. I would have to go through all of that data to pick out each one employed, but if you refer to Schedule II we do have the names of those individuals, but these are not original records we used.

Q. Then personally, Mr. Popovich, you cannot go through these master sheets and point out from the record that you have, the difference between the employees of Duque & Frazzini, and those of any other contractor?

A. You could, because we have weekly payroll sheets, and have Duque & Frazzini's daily time cards, and so, therefore, we could say those charges were made to Duque & Frazzini, because we do have their slips here. As for the segregation, we have that data. We have the data I have testified to.

(Testimony of George J. Popovich.)

Mr. Homer Thompson compiled the data to show how we arrived at it, but we do have all the weekly payroll sheets and time cards.

(Short recess.)

Q. (By Mr. McCall): I believe you stated before recess that you have before you some of the weekly payroll sheets submitted to the plaintiff by Duque & Frazzini, from which you made up Schedule No. II, is that correct?

A. Yes, we have the weekly payroll sheets, and some of the time cards; not all of them.

Q. The time cards that you have before you are dated in what month?

A. Some of them are in May. Here is one May 14th. We have some in June.

Q. All the others are June, 1945, are they not?

A. We have them in May. Like I say, I would not know, because I don't have them all with me.

Q. How many do you have for the month of May?

A. I would have to segregate them. May, and some for June; just a few were all we brought.

Q. You only have one for the month of May, don't you?

A. We have quite a number. Here they are. Here is May 14th?

Q. Will you look at the weekly payroll sheet from which you made up Schedule No. II, and find on that the name of Paul Albino?

A. What page is that on, sir?

(Testimony of George J. Popovich.)

Q. Schedule No. II of your Bill of Particulars shows the first name to be Paul Albino. Will you look on the weekly payroll sheets submitted to you by Duque & Frazzini, and find Paul Albino?

A. Here is one right here.

Q. Just the payroll sheets only.

A. You are making a segregation between the cards and the sheets?

Q. I was asking, Mr. Popovich, if you can show the court here how you made the segregation you prepared on Schedule No. II?

A. We have daily time cards which we used to make that schedule.

Q. You do not have any weekly payroll sheets then to make up Schedule II, is that right?

A. We have weekly payroll sheets, the original weekly payroll sheets, that cover all of Schedule II, but no segregation was used for any of them. We don't have all the time cards here to support all of them.

Q. When you referred to the original payroll sheets, you have reference to the master payroll sheet prepared by Basich Brothers, do you not?

A. When I speak of the original payroll sheet, I am speaking of the original payroll sheet submitted to the home office showing a list of all employees of Duque & Frazzini, and others, and Basich Brothers.

Q. That is all you have from which you made your Schedule No. II of your Bill of Particulars, is it?

(Testimony of George J. Popovich.)

A. No, sir, you couldn't make that schedule from these. I have got information to support these. What we have to support them are some time cards, and some weekly payroll sheets of Duque & Frazzini.

Q. Can you show the court one weekly payroll sheet submitted to you by Duque & Frazzini, from which you made up any part of Schedule II?

A. We don't have all the information here that we used to compile Schedule II.

Q. Do you have before you in court any weekly payroll sheets submitted to the plaintiff by Duque & Frazzini from which Schedule No. II was prepared?

A. All of the information that we used to prepare them was taken off of either weekly payroll sheets submitted to us by Duque & Frazzini, or from time cards presented to us by Duque & Frazzini.

Q. Will you read the question to the witness, Mr. Reporter?

(Record read by the reporter.)

A. Do you have particular reference to these sheets here, sir, these weekly payroll sheets?

Q. I only have reference to any payroll sheet submitted to you by Duque & Frazzini from which Schedule No. II was prepared?

A. We have weekly payroll sheets and we have time cards presented to us that were used to compile all the information set forth in Schedule No. I.

(Testimony of George J. Popovich.)

Q. I will ask you then to examine the time cards and the weekly payroll sheet which you used in preparing Schedule No. II.

A. We don't have all the records here to support them.

The Court: Counsel wants to know if you have any weekly sheet.

Mr. Monteleone: No, I don't think we have.

The Court: Let us go on. It is quite evident he does not have all the information here.

Q. (By Mr. McCall): And that is the same with reference to the comment we have made on Schedule No. III, is it not? If you will refer to your comments, Mr. Popovich?

A. Yes, sir, that is true for No. III. We don't have all the records here with us.

Q. And also for No. IV, No V?

A. We don't have all the records here for IV or V.

Q. You do not know whether the things that we have pointed out in there are errors or not, is that right?

A. I have my working papers here, and I have checked everything brought out in Schedules III, IV and V.

Q. Can you say from checking that you have done whether or not the overpayments we represent to have been made in II, III, IV, and V were overpayments?

A. I say that the payments made for the employees were those rates submitted to us by Duque

(Testimony of George J. Popovich.)

& Frazzini, and if an employee was borrowed from us he was charged the same rate of pay that we paid everybody.

Q. Mr. Popovich, you stated under direct examination that you took care of all the insurance for Basich Brothers in connection with this job at Tucson, is that correct?      A. Yes, sir.

Q. Did you arrange for the compensation insurance?

A. Yes, sir, we had a policy in force, and we deposited with that I think approximately \$10,000.00.

Q. Do you have that policy in court today?

Mr. Monteleone: I think the clerk has it. That was left with the court, Mr. McCall.

Q. (By Mr. McCall): I will ask you, Mr. Popovich, if you are familiar with the insurance policy of compensation on this job?

A. I am familiar with it to the extent that we were covered for all operations.

Q. That is Exhibit 19. Can you state to the court, without looking at the exhibit, if it contains the name of Duque & Frazzini as subcontractors?

A. Schedule XIX?

Q. No, Exhibit 19. Mr. Clerk, do you have Exhibit 19?

Mr. Monteleone: I think the exhibit speaks for itself, Mr. McCall.

The Court: I think the documents speak for themselves. I think it will be conceded that the name does not appear.

Mr. McCall: All right.



(Testimony of George J. Popovich.)

Q. Beginning with Schedule No. VII of your Bill of Particulars, Mr. Popovich, Equipment Rentals, you testified this morning that those schedules were made up—Schedule No. VII was made up by equipment time cards signed by each employer.

Mr. Monteleone: Each employee.

A. By each employee.

Q. (By Mr. McCall): And the time cards signed by him and the foreman. Do you have in court all the time cards making up Schedule No. VII?

A. I don't have all the time cards here at all, sir.

Q. Do you have any time cards from which you made up Schedule No. VII?

A. Not with us here.

Q. Then beginning with No. VII to No. XLIV, all of your testimony with reference to this equipment being used on the subcontract only was from information given to you by someone else, and not from your own personal knowledge, was it not?

A. From the records, sir.

Q. And from what records?

A. From books of original entry, paid invoices, time cards.

Q. When you refer to books of original entry, you refer to the record sent to you prepared by Basich Brothers on the work, is that right?

A. The records submitted by them to us, and

(Testimony of George J. Popovich.)

also records submitted by the office. The job controls are kept in the home office.

Q. Then you were never on the job at Tucson, the original job, or the subcontract job, were you?

A. I never was on the job, sir.

Q. In connection with all of this equipment rental, did you have any contract signed by Duque & Frazzini, or anyone in their behalf, for the equipment?

A. The only record that I have of this particular equipment is where Mr. Frazzini called me on the telephone and asked me to obtain some for him, and I made arrangements, sir, so as to get such as the power unit, and various parts that he was unable to obtain, and asked me to get for him.

Q. That's the only equipment or supplies that you know about of your own knowledge?

A. That is of direct knowledge, yes, sir.

Q. In what schedules are those particular items covered?

A. Well, sir, we have in Schedule—I can give you a few here. That schedule calls for equipment rentals; that shows Bressi & Bevanda, Industrial Equipment Company—that is Schedule No. XIII. Mr. Frazzini asked me to rent this power unit, and we made arrangements to do so.

Also on Schedule XIV, Industrial Equipment Company, he has asked me to rent a power unit. We also did that. Then we have other items, consisting of screens used in connection with the Pioneer Crushing plant—this small crushing plant. He

(Testimony of George J. Popovich.)

was unable to obtain certain supplies or screens, and requested me to purchase those for him.

Q. What schedule is that mentioned in?

A. That is Schedule—here is the one here, for Axman-Miller Construction Company. I rented that. That is Schedule No. XXV.

Schedule No. XXVII, I also purchased various screens for him, and if I am not mistaken this belting—he was unable to get conveyor belting.

Q. So far as you know then there was no written agreement between Basich Brothers and Duque & Frazzini with reference to the rental of any equipment whatever, is that right?

A. That was a written agreement. We have had a lot of oral agreements. Do you have reference to written agreements?

Q. Yes. Mr. Popovich, do you know of any written agreement between Basich Brothers Construction Company, the plaintiff, and Duque & Frazzini with reference to the rental of the equipment mentioned in any of these schedules?

A. Yes, agreements that were drawn up. I would not have any knowledge here, unless the field office has knowledge where direct contracts were made, but the data that I made—I would talk to him on the telephone before shipping the equipment over to him. I would ask for his personal O.K., and he would say to ship it either in a truck, or by some carrier.

Q. Outside of these two items, you know noth-

(Testimony of George J. Popovich.)

ing about any equipment, you testified to this morning?      A. Outside of the record.

Q. I call your attention to Schedule IX, Mr. Popovich. Will you look at page 30 of your comments on the Bill of Particulars. On page 30 of the comments on the Bill of Particulars—

A. Page 30, on Schedule IX?

Q. With reference to Schedule IX, where the following statement is made:

“This Schedule shows royalty charges for sand production on the basis of 995 tons. Schedule XVII shows royalty charges for sand production on the basis of 2,223 tons, a total of 3,218 tons of sand. The credit allowed for sand production in Schedule XXXIV (XLIV), however, is 751 tons of sand.”

A. Yes, the rental of the Pioneer Crushing plant and the hot plant was made by Duque & Frazzini and Mr. N. L. Basich on royalty leases for a sand production basis of 995 tons, on Schedule IX. Schedule XVII shows royalty charges for sand production on the basis of 2,223 tons, a total of 3,218 tons. Of this amount, 751 tons of sand was used by us for Seal Coat, and concrete aggregate, mineral aggregate, of which there was that item credited as given in Schedule XXXIV for Seal Coat sand. The other sand was used for mineral aggregate and concrete aggregate.

Q. You stated that you charged a royalty of 10 cents per ton on the Pioneer Crushing machine, in Schedule IX, is that correct?

(Testimony of George J. Popovich.)

A. On the Pioneer for mineral aggregate.

Q. That is on Schedule IX of your Bill of Particulars?

A. According to Mr. N. L. Basich on an agreement with Duque & Frazzini, we were to charge them 10 cents a ton.

Q. Do you have any place the number of tons which you charged them with?

A. Do you mean the grand total for Pioneer?

Q. Yes.

A. I don't have it. I would have to compute that.

Q. Do you know then where the information was gotten from to make that Schedule No. IX?

A. From records submitted by our engineers, and also our engineers' computations-with the U. S. engineers' estimate.

Q. Do you have those records before you?

A. I don't have those records. They were compiled—we have those at the office. Our engineers would check the others engineers' records.

Q. I call your attention to Schedule XXX of your Bill of Particulars, Miscellaneous Labor, Invoices, and so forth, February 26, 1945, to June 16, 1945, \$2,814.24, and I will ask you from what information did you make this schedule?

A. Do you mean Schedule XXX? Shall I take each one separately?

Q. Just state to the court the information from which you made up Schedule No. XXX. It says "Move & Set Up Pioneer."

(Testimony of George J. Popovich.)

A. Those records were obtained from our time cards.

Q. Do you have them before you in court?

A. We don't have all the time cards here, sir. They were made up of time cards and weekly payroll sheets presented to us by Duque & Frazzini.

Q. You say that Duque & Frazzini submitted to you time cards and weekly payroll sheets from which you made up Schedule XXX?

A. Yes, plus—well, I see J. G. North here. We also took invoices paid to J. G. North into consideration, and I notice it says Tucson Machine & Engineering. We also took into consideration the invoices paid by us.

Q. Beginning with Item 2/26/45, page 1 of your Schedule XXX, in the amount of \$33.69, can you tell how that labor is made up?      A. \$33.69?

Q. Yes.

A. We can tell that by our time cards, and other records we don't have here available.

Q. Do you have any records available in court today from which you made up Schedule No. XXX?

A. We don't have all the records here.

Q. Do you have any of them here?

A. No, we would have to have our work papers to compute that.

Q. Mr. Popovich, do you know why you left out all the names of the men who you have charged to Duque & Frazzini on Schedule XXX?

A. No reason at all, sir. We can supply the names.

(Testimony of George J. Popovich.)

Q. On the other schedules you include the names of workmen, but on Schedule XXX, for some reason they were left out.

A. We have no reason at all.

Q. As a matter of fact this Schedule XXX was all made up of the plaintiff's own employees, was it not?

A. The plaintiff's own employees? This was all Duque & Frazzini's employees.

Q. And plaintiff's employees were not working on Schedule XXX, is that right?

A. You stated the plaintiffs were not working on Schedule XXX. They are all the defendants' employees.

Q. Will you submit to the court tomorrow morning when you return the names of the employees on the first page of Schedule XXX?

A. Yes, sir, we will bring all our records here.

Mr. Monteleone: Mr. McCall, there are four boxes of them. We will be willing to bring the four boxes of daily payroll records.

Mr. McCall: Of course, we are not asking you to do such a job as that, but I would like to see if the plaintiff can produce the names of the men making up Schedule XXX, if plaintiff still contends they were not his employees.

A. We will have to go back to the office and work on this tonight, and obtain all this information.

Q. Mr. Popovich, as a matter of fact, this Schedule XXX, all these items on the first page of Schedule XXX were incurred by the plaintiff

(Testimony of George J. Popovich.)

Basich Brothers Construction Company for the setting up of the Pioneer Crusher, were they not?

A. This was all incurred by Duque & Frazzini. These were Duque & Frazzini's employees, setting the crusher up.

Q. Did you prepare this Schedule XXX yourself? A. No, sir.

Q. Do you know what is mean by "move & set up Pioneer"? A. Yes, sir.

Q. What is meant by "move—"

Mr. Monteleone: As used in the Bill of Particulars, is that right?

Mr. McCall: Yes.

A. They mean by that, suppose you have your equipment spotted in one place, and you want to move it say 200 or 250 feet; that is considered a part of a move. Setting up means taking two sections of the Pioneer plant built together, and setting up all the conveyors there, both the primary crusher and the roll crusher.

Q. I believe you testified this morning that you prepared the subcontract in this case.

A. Yes, sir, I did, with Duque & Frazzini.

Q. I call your attention to Article XXII of the subcontract—I beg your pardon, it is Article XII, entitled: Completion Work by Contractor, which reads in part:

"In the event Basich Brothers Construction Co. plant is used, moving in and moving out expense will be paid by Basich Brothers Construction Co."



(Testimony of George J. Popovich.)

A. He talked with Mr. Basich in regard to that matter. I was present.

Mr. McCall: I move that the answer be stricken as not responsive to the question.

The Court: You had better answer the question.

Mr. McCall: Will you read the question to him, please?

(Question read by the reporter.)

A. By that we meant the cost of transporting the equipment from Alhambra to Tucson, and back, was to be paid by Basich Brothers Construction Company.

Q. I call your attention, Mr. Popovich, to your Schedule XXXVI.

A. Yes, sir. On Schedule XXXVI the insurance charge was computed as follows: Computation per 100, by Code 5546, was \$4.60; Federal and Arizona Unemployment Insurance Excise Tax, \$4.00; a total of \$8.67 per hundred. No charge was made for public liability and property damage, because the truck drivers are insured under the truck owner's contract policy, and therefore P.L. and P. D. was not charged.

Q. You did have P.L. and P.D. charged until you received this statement which we are looking at now, did you not?

A. What statement did you have reference to, sir?

Q. Comments on the Bill of Particulars.

A. On your Bill of Particulars you state:

(Testimony of George J. Popovich.)

“Plaintiff has not exhibited to defendant evidence of authority for the rating used in computing Workmen’s Compensation Charges.” I notice the charge on insurance on labor is \$2103.75 at 8.67 per 100. If I understand you correctly, I just give you the breakdown of how we arrived *at of* \$8.67 per 100.

Q. On Schedule No. XXXVI—do you have that before you?      A. Yes.

Q. Date 6-7-45, Move & Set Up P.D.O.C. plant, \$2,500.00, invoice.      A. Yes, sir.

Q. Was this ordered by Duque & Frazzini?

A. I have no knowledge of that, sir. Our records show that the invoice shows \$2,500.00 charged and chargeable to Duque & Frazzini.

Q. Do you have any other information on that \$2,500.00, in a breakdown other than invoice?

A. Mr. N. L. Basich made the deal on that.

Q. You have no personal knowledge about it?

A. No, I just have what we paid him, and it was charged accordingly, per our records.

Q. Then I call your attention to Schedule XXXIX. Do you have that Schedule XXXIX of your Bill of Particulars before you?

A. Yes, sir.

Q. Do you have the defendant’s comments on page 36 before you, Mr. Popovich?

A. Yes, sir.

Q. Will you read Article XXII, Item 11, of the alleged subcontract?

A. Under what schedule?

Q. This is under Schedule XXXIX.

A. All right.

(Testimony of George J. Popovich.)

Q. No. XXXIX. Then I call your attention to subcontract, Item 11, Article XXIII, which reads in part: "Measurement to be computed on truck water level." Then in your schedule you have "Measure for purposes of credit to Duque & Frazzini is made by this schedule dividing square yards in place by 15." Can you tell the court why Schedule XXXIX does not give credit according to Item 11, Article XXIII of the subcontract?

A. To verify these figures in Schedule XXXIX, they were made up by our engineers using quantities, and also checking the engineers' measurement, that is, the P.D.O.C. estimate, and of Mr. N. L. Basich. Mr. Mitchell is the engineer. The P.D.O.C. estimate was used to compile these figures.

Q. I call your attention to Article XXIII of the subcontract, and Item 11, which provides that the measurements will be computed on truck water level, and Schedule XXXIX shows that the computation was on square yards. Can you tell why that was changed?

A. Mr. N. L. Basich will tell. I do not know why it was changed.

Mr. McCall: That is all.

#### Redirect Examination

By Mr. Monteleone:

Q. Mr. Popovich, in preparing your Bill of Particulars you stated that you had used daily payroll records that were furnished to you by Duque & Frazzini, and also weekly payroll records. Now,

(Testimony of George J. Popovich.)

did you duplicate the daily and weekly in arriving at it, or did you segregate each one?

A. We segregated each one, and took them into consideration so no double payment would result.

Q. How many boxes of daily payroll records do you have in connection with the Duque & Frazzini job?

A. Homer Thompson, my office man, bunched them all together. I imagine there are three or four there.

Q. During the investigation were those records shown to the auditor of the Glens Falls Indemnity Company?

A. Yes, they were available to him. He spent several weeks in our office. We gave him everything he asked for.

Q. With reference to Workmen's Compensation policy, I understand you had a discussion with Mr. Frazzini before the subcontract was signed?

A. Yes.

Q. If Duque & Frazzini had to make their own Workmen's Compensation payment, would they have been required to make a deposit with the State?

A. Yes.

Q. But you already had taken care of that for him?

A. Yes, we deposited \$10,000.00.

Q. That was previous to this time?

A. Yes, and Mr. Hutchinson, the auditor, verified the record; went over it with our office, and also with Homer Thompson.

Q. So you were saving money and expense to

(Testimony of George J. Popovich.)

Duque & Frazzini by accommodating them with the Workmen's Compensation?

Mr. McCall: I object to that as calling for a conclusion.

The Court: Overruled.

Q. (By Mr. Monteleone): Is that a fact?

A. Yes, that was in accordance with our agreement under the contract.

Q. You were helping them out and saving them money by doing so, is that right?

A. Yes; it was mentioned that they were unable to take care of labor and insurance, and asked us to do it. So far as the other items are concerned, they said they were financially competent to do that. That was the reason we inserted the special provision about labor and all the insurance.

Q. Had they been required to pay their own workmen's compensation, would the State have required them to make a deposit?

A. They always required it of us and foreign companies, who had never worked in Arizona before.

Q. Who paid that deposit?

A. We paid the \$10,000.00.

Q. Mr. Popovich, was it customary among contractors in construction work for the general contractor to procure supplies or equipment for the subcontractor, and then charge the same against the subcontractor?

A. Yes, that is done quite frequently. It is purely an accommodation extended to them.

(Testimony of George J. Popovich.)

Q. In connection with Schedule XXX, in connection with moving in and moving out of the Pioneer plant, did you make any charge in the Bill of Particulars for the expense of moving in and moving out the Pioneer plant? A. No.

Q. When you referred to moving the Pioneer plant, in your Bill of Particulars, what expense were you referring to?

A. Miscellaneous moving, and assembling the whole plant. We brought the plant in in several truck loads, and put the plant in one place. They agreed to go ahead and move it around, and adjust it, and assemble it. That is called moving and set-up. That is a general term used in construction.

Q. In other words, during the operations of Duque & Frazzini this plant has been moved from one point to the other point, and put up again?

A. Yes.

Q. The items referred to in that Bill of Particulars have reference in connection with charges by Duque & Frazzini in connection with their operations? A. That's right.

Mr. Monteleone: That is all.

Mr. McCall: No further questions.

Mr. Monteleone: Mr. McCall, do you want us to bring in the payroll records tomorrow?

Mr. McCall: I am not stating to the plaintiff what records to show.

The Court: I think to be safe, in order to make my ruling correct, you should bring in everything that you have. If you have a truck load, I will give

(Testimony of George J. Popovich.)

you special permission to bring them in here. If you can show that you have them here, then the rule is complied with.

Mr. Monteleone: We will bring them in tomorrow.

The Court: I am doing that to save Mr. McCall the embarrassment of having to stipulate to anything he might not wish to, and that is in no way a criticism.

(Whereupon, an adjournment was taken until Wednesday, February 5, 1947, at 10:00 o'clock a.m.)

Los Angeles, California

Wednesday, February 5, 1947, 10:00 a.m.

Mr. Monteleone: May the record show, if the Court please, that the plaintiff has brought into court eight boxes of records kept by the plaintiff in connection with this particular job involved, to which the witness George Popovich referred in his testimony yesterday, and that they are available to the court or to the defendant.

The Court: All right.

Mr. McCall: May it please the court, to clarify the position of the defendant, and possibly save more time, it is not our position that the payments alleged here were not made. It is only our position that the defendant is not liable for the amounts paid for various reasons, which we have shown, or can show. We admit they made payments, but,

because they were premature, and for other reasons the defendant is not liable.

The Court: You have required them to meet the burden of showing they actually made them, in addition to the proof, which has taken a full day. Now, they may as well complete whatever showing they desire to make. Had you admitted they were made, and merely questioned the validity, we would have saved a day yesterday. I don't think there is an admission in the record. This case, unfortunately, because it went before three judges, left the record in an unsatisfactory fashion. When I conclude the taking of the testimony that will be the end, and it will not be reopened by me. In other words, there will not be one item as to which there is no stipulation, or as to which proof does not exist in the record. Proceed with your proof.

### BART C. WOOLUMS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. Bart C. Woolums.

### Direct Examination

By Mr. Monteleone:

Q. Mr. Woolums, where do you reside?

A. Los Angeles.

Q. What is your business or occupation?

A. Construction superintendent.



(Testimony of Bart C. Woolums.)

Q. Were you connected in any way with the construction of the Davis-Monthan Air Base near Tucson?

A. Yes, I represented the government as the resident engineer.

Q. During what period of time did you represent the government in that capacity?

A. About five years.

Q. Commencing when, up to what time?

A. I started in 1941 and finished in 1946.

Q. What was the nature of that construction work?

A. At Tucson, do you mean?

Q. Yes.

A. It was paving runways, drainage.

Q. What was the general purpose of that construction? For what was it to be used?

A. To strengthen the runways for the larger bombers.

Q. While you were there did you come to know Mr. Carson Frazzini, and Mr. Duque, his partner?

A. Yes, I met the gentlemen.

Q. Mr. George Popovich? A. Yes.

Q. And N. L. Basich? A. Yes.

Q. Did you have occasion to visit the pit site where the material was being produced, during the year 1945, for this bomber base? A. Yes.

Q. How often did you visit the site?

A. I imagine once every day.

Q. In his deposition, Mr. Carson Frazzini made a statement that you and Mr. Popovich, about May 19 ordered that he not remove material from a cer-

(Testimony of Bart C. Woolums.)

tain site that he was prospecting. Bearing that in mind, do you recall having been at the pit site about that time?      A. Yes, sir.

Q. Who were present at the time?

A. Well, Mr. Gollobs.

Q. Who is Mr. Gollobs?

A. Mr. Gollobs is the owner of the pit, of the property. George Kovick and Harold Sloniger, and myself.

Q. Who is Mr. Sloniger?

A. Mr. Sloniger represented me in the field.

Q. Was Mr. Duque or Mr. Frazzini there? Were they present also at the time?      A. Yes, sir.

Q. Was Mr. Kovick there?

A. Mr. Kovick was there.

Q. State what was said or done at that time in connection with that matter?

A. I was called down, due to the scarcity of material. The Basich Construction Company had to find more material. I say they had to find more material, because they were the general contractor, and Duque & Frazzini were the subcontractors, over which I have no control.

Mr. Gollobs had a house practically built on the highway, and they had already, in years previous, had a pit at the site of his property, running parallel to the back of it. I remember this particular day I was called down, and Duque & Frazzini wanted to turn abruptly, and go behind the man's barn and his house, to get the material.

(Testimony of Bart C. Woolums.)

Mr. Gollob said to me—in years previous I had contacted him, and he told me he would help the government in any way he could to produce material for the runways for the Davis-Monthan Field. He said, “I would rather they tear up my back yard, and not my house.” I agreed with him that the man had done everything in his power to help the government, and also the contractors, and I don’t see how he could allow them to destroy his home.

Mr. McCall: I object to that, may it please the Court, as assuming a fact not in evidence. There is no evidence before the court that they were trying to destroy the man’s back yard.

Mr. Monteleone: This is what you told Mr. Frazzini at the time, as said by Mr. Gollob?

A. That’s right. I said as far as my part, representing the government, I have no part in it.

The Court: Objection overruled.

Q. (By Mr. Monteleone): Did Mr. Kovick make any comment at the time that you recall?

A. Mr. Kovick said that he was of about the same opinion. There were other materials available, which were further away.

Q. Did you or Mr. Kovick tell Mr. Frazzini, or Mr. Duque, that they could not remove material from the site where they were standing—remove the material? A. No, sir.

Q. The only one who objected to that was Mr. Gollob, is that correct? A. That’s right.

Q. In connection with the measurement of ma-

(Testimony of Bart C. Woolums.)

terial used in connection with this government job, was that under your general supervision, in determining the quantity?

A. Yes, sir, to make payments for the government, we had to take a field party to the cross sections and compute it for quantity.

Q. How was that done?

A. I had my field party. They went out and took all the necessary measurements, and came back to my office, and turned it over to my office engineer. He would compute the quantities which we would submit to the general contractor.

Q. Did the general contractor also have an engineer to make their own computations?

A. Yes.

Q. Were these computations made in the ordinary course of business?      A. Yes.

Q. From your observation, and your supervision, were they accurately made, so far as humanly possible?      A. Yes.

Q. They were made in the regular manner of making measurements, is that correct?

A. Yes.

Q. While you were at the pit, during the progress of the work, did you ever hear George Kovick, or anyone connected with Basich Brothers, ever give Duque & Frazzini orders, or direct how they should operate their plant, or their operations?

A. No, sir; that was none of my business.

Mr. Monteleone: That is all.

(Testimony of Bart C. Woolums.)

Cross-Examination

By Mr. McCall:

Q. Would the reporter please read the last question counsel asked, and the answer?

(Record read by the reporter.)

Mr. Woolums, were you at the pit on the 19th day of May, 1945?      A. Yes, sir.

Q. What time were you at the pit on that day?

A. I would say it was about 11:00 o'clock.

Q. Was Mr. Kovick and Mr. Albino present at that time?

A. Albino, no, sir. Mr. Kovick was.

Q. Did you hear Mr. Kovick countermand the order to Mr. Frazzini, and instruct the men to go back to work on the Pioneer Crusher?

A. No, sir.

Q. You do not know whether he did that on the 19th of May or not?

A. I couldn't tell you.

Q. What were you doing at the pit on the 19th of May, about 11:00 o'clock?

A. Mr. Gollob sent my inspector after me, and wanted to explain to me why he could not allow them to use this particular material, because two years previous I went to Mr. Gollobs and had him give the contractors, previous to this job, permission to use his materials. Naturally, he looked to me for someone to tell his troubles to.

(Testimony of Bart C. Woolums.)

Q. Did he tell you that Duque & Frazzini wanted to move the plant over closer to his house?

A. It was not a case of plant moving; just a case of taking materials.

Q. How did they go about taking materials, by truck or shovel?      A. Shovels and trucks.

Q. Had they moved the shovels and trucks and started taking the material closer to his house?

A. Well, I think the shovel was across the street. It's impossible to say, because I don't keep that much of a record of it.

Q. How far was the gravel that you understood they wanted to take from his house?

A. How far was it from where?

Q. From Mr. Gollob's house?

A. It would run right up to within 50 feet of his house.

Q. Who told you it would run up that close?

A. Because as I said previously, with two years' experience I knew the pit pretty well. That was the only place to take that material from behind his house. We had stopped the previous contractors from going back behind his property. They had to run parallel with the river.

Q. Was Mr. Duque, or Mr. Frazzini there that morning?      A. Which morning was that?

Q. May 19th, the time you are talking about.

A. Mr. Frazzini was there.

Q. He was there at the time you were there?

A. Yes.

Q. That was about 11:00 o'clock?

(Testimony of Bart C. Woolums.)

A. I would say it was, in the morning, yes.

Q. Had the Pioneer plant shut down at that time?

A. That I don't know.

Q. Were you at the Pioneer plant?

A. The Pioneer plant was sitting at the pit, but that was none of my jurisdiction.

Q. Was it operating at that time?

A. That I couldn't say.

Q. Did you hear any dispute between Mr. Frazzini and Mr. Kovick about whether or not the Pioneer plant would continue to run that day?

A. No, sir.

Q. Mr. Woolums, can you state to the court now definitely that Mr. Frazzini was at the pit on Saturday morning, May 19, 1945, when you say you were there?

A. Well, I can't quote dates, because I took no record of the date; but, as I said previously, we had this meeting on or about that time.

Q. You say you were in the pit on an average of once a day while you were on the job?

A. Yes, sir.

Q. What were you doing in the pit once a day?

A. I supervised all the construction. I went down to contact my two field men. I had two field inspectors inspecting the material; how it was crushed; how it was delivered.

Q. When was the first day that you went to the pit?

A. I went to the pit every day of the job.

Q. When did the job start?

A. I can't give you the correct date.

(Testimony of Bart C. Woolums.)

Q. Just approximately, according to your recollection.

A. It must have started sometime in February or March. I couldn't tell you without looking it up.

Q. In 1945? Do you know what date in February or March, 1945, the first material was produced? A. No, sir.

Q. And every day that you were in the pit, did you see Mr. Kovick? A. No, sir.

Q. Did you ever see him in the pit?

A. Yes, sir.

Q. How often?

A. Off and on at intervals I would happen to meet him, or I wouldn't happen to meet him—I might be down there, or he might be up in the field.

Q. Were you in the pit at any particular time of the day each day?

A. No; whenever it was my convenience to go down.

Q. Did you ever see the subcontract between Basich Brothers Construction Company and Duque & Frazzini? A. No, sir.

Q. You know nothing about that.

A. I know nothing about it.

Mr. McCall: That is all.



(Testimony of Bart C. Woolums.)

Redirect Examination

By Mr. Monteleone:

Q. Mr. Woolums, do you recall writing a letter to Basich Brothers, dated June 7, 1945, a copy of which has been introduced in evidence in this matter, in reference to the production of material?

Mr. McCall: We will stipulate that the letter that plaintiff has, purporting to be from Mr. Woolums, as an exhibit, was from him.

Q. (By Mr. Monteleone): Do you recall writing that letter?

A. Yes, I believe I wrote three or four letters to Basich Brothers.

Q. This one is dated—may I refer to my copy, Mr. McCall? It is an exact copy.

Mr. McCall: No objection.

Q. (By Mr. Monteleone): I show you what appears to be a copy of a letter dated June 7, 1945, to Basich Brothers Construction Company, attention Mr. G. W. Kovick, and at the bottom signed B. C. Woolums, resident engineer, and ask you to glance over that letter.

A. Yes, sir.

Q. To the best of your knowledge were the statements made in this letter correct and accurate facts?

A. We kept a daily log of everything, and we wrote these letters from our office records.

Q. To the best of your knowledge, the facts were correctly stated in that?

A. Yes.

Mr. Monteleone: That is all.

Mr. McCall: No further questions.

Mr. Monteleone: Mr. Basich, take the stand.

NICKOLA L. BASICH

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Monteleone:

Q. Mr. Basich, you are a party, who gave your deposition in connection with this matter, which has heretofore been filed, is that correct? A. Yes.

Q. I will try and not ask you any questions in connection with matters covered by your deposition, but in connection with other matters. When Mr. Frazzini came to your office, shortly prior to signing the contract of February 7, 1945, did you have any discussion with him about this man Paul Albino? A. Yes.

Q. State what was said in connection with it at that time.

A. Yes, we talked about Albino. We told him we had the plant, and we were willing to pay freight and back.

Q. What plant are you referring to?

A. The Pioneer. Pay the freight forth and back, free of charge, for him to take care of everything at a reasonable rate. I told him this plant cost \$40,000.00, and I would like to have a good experienced man to run it, a very good one. He says, "I don't have any."

(Testimony of Nickola L. Basich.)

I told him, "We have a man that ran this plant off and on. I would like to have him on the plant if it is possible, if he is available."

He told me, he said, "I will be glad to have him, because we haven't got anybody."

Q. At that time was Paul Albino in your employ?      A. No.

Q. Was he on your payroll at that time?

A. No.

Q. Later on, after the contract was signed between you and Duque & Frazzini, did Frazzino have any further conversation with you concerning Paul Albino?

A. Yes, I think about the 3rd or 4th of February Mr. Frazzini asked me if I got in touch with Mr. Albino; if he was available.

Q. What did you tell him?

A. I told him we located through our Social Security where he was, and we wrote him a letter, but we have not got an answer at that time.

Q. Did you at any time tell Mr. Frazzini or Mr. Duque that they could not rent this Pioneer plant from you until they hired Mr. Albino?

A. No.

Q. Did you at any time, while Albino was working in connection with the operations of Duque & Frazzini, give Albino, or anyone else, any orders or directions?      A. No.

Q. Do you know of your own knowledge whether anybody connected with the Basich Brothers ever gave Albino any directions as to how to operate that

(Testimony of Nickola L. Basich.)

plant while he was working for Duque & Frazzini?

A. No.

Q. Did Basich Brothers have anyone, while the Pioneer plant was being operated by Albino, to supervise those operations? A. No.

Q. I understand you and Duque & Frazzini agreed upon a rental basis of 10 cents a ton, is that correct? A. Yes.

Q. What did the Pioneer plant consist of when this arrangement of 10 cents a ton was entered into?

A. It consisted of the plant itself, which consisted of the crusher, 10 by 36, rolls 20 by 48; screens, bins, and all odds and ends; feed conveyor, that feeds the plant, return conveyor, finished products conveyor, and waste conveyor, and a bunker.

Q. Did Duque & Frazzini later on rent from Basich Brothers any additional bins and screens?

A. Yes.

Q. That was a separate transaction?

A. Yes.

Q. What was the condition of this Pioneer plant when it was first turned over to Duque & Frazzini, so far as rolls and other parts were concerned? A. Completely built.

Q. In good condition? A. A-1.

Q. Later on there were repairs and replacements put on the Pioneer plant while it was being operated in the production of materials as specified in the subcontract of date February 7, 1945, which

(Testimony of Nickola L. Basich.)

it set forth in the bill of particulars. Are you familiar with those items?      A. Yes.

Q. In your opinion were those repairs and replacements made necessary by reason of this operation in producing this material?      A. Yes.

Q. In your opinion were the charges made reasonable charges for these repairs?      A. Yes.

Q. In connection with the rollers or crushers, what effect did the operation have on that matter?

A. The roller crusher and jar crusher is used in the making of little rocks out of big ones. They wear out. The crusher consists of rolls, one roller corrugated, and one is flat, and every couple of weeks after they are new, or three weeks, it all depends on the hardness of the rock, you have got to build them up, or put in new rolls, because they become cut and smooth, and they won't crush.

Q. In connection with the Bill of Particulars it shows that during the course of time that material was being produced, as specified in the subcontract of February 7, 1945, continuing even after Duque & Frazzini left the job. Were these repairs and replacements therein specified necessary in order to produce the materials so specified in the subcontract?

A. Yes, they were more necessary than before, because the plant was worn out, and required some more repairs.

Q. That condition was brought on by reason of the operation in producing this material, which required repairs?      A. That's right.

(Testimony of Nickola L. Basich.)

Q. Were those—any of those used by Duque & Frazzini in connection with their operations?

A. Yes.

Q. Following that, after Duque & Frazzini pulled off the job, on or about June 8, 1945, the Bill of Particulars shows a list of expenses incurred in connection with the production of materials set forth in the subcontract of February 7, 1945, consisting of rental of equipments and other items, repair of equipments. Were those items so specified, in your opinion reasonably necessary in order to produce the material? A. Yes.

Q. Were they actually used in the production of this material? A. Yes.

Q. In your opinion were those expenses reasonable charges? A. Yes.

Q. Mr. Basich, after Duque & Frazzini ceased to produce material, and you produced material, were you able to buy material from any source, to take the place of the material specified in the subcontract, at a cheaper amount than it cost to produce it as shown in the Bill of Particulars?

A. No, we tried to get products. They were sky high. I am sure we tried. The first trip of Mr. Bray in Tucson, I told him what the material cost us brought in from the outside.

Q. In other words, your operation was cheaper than you could purchase material? A. Yes.

Q. Were you able to arrange for the production

(Testimony of Nickola L. Basich.)

of that material through any other means, aside from the means you adopted?

A. Not for the same cost.

Q. In other words, it would have cost you more to make other arrangements, is that correct?

A. Yes.

Q. Can you explain why it is that the Bill of Particulars shows that the cost amounted to more than the amount of production?

A. On the operations from June 9th?

Q. Yes.

A. In the first place, the plant was worn out, and you can check through the Bill of Particulars and see it takes more parts for the plant, for upkeep, and more money for upkeep, and a less production.

Second, when Duque & Frazzini pulled off they left us high and dry. We had to get the equipment there. You can see in the Bill of Particulars we paid 17½ cents truck measure for the P.D.O.C. plant, and our plant, the Pioneer, we charged 10 cents a ton. In the P.D.O.C. plant there is rock, dirt, and sand, whatever comes. It was measured. On the Pioneer plant there was nothing but pure rock to be crushed.

Q. In your opinion were the operations carried on after Duque & Frazzini pulled out in as efficient and economical manner as it was physically possible to do so?

A. The best that could be done.

(Testimony of Nickola L. Basich.)

Q. What happened when Duque & Frazzini pulled off of that job, Mr. Basich?

A. I wasn't that day on the job.

Q. Did they talk to you before they pulled off the job?           A. No.

Q. Did they remove all of their equipment from the job?

A. All of the equipment, except two electric motors, which were operating the screens, on the Pioneer plant.

Q. Going back to this Pioneer plant that you installed, had you discussed the matter with Duque & Frazzini and Mr. Bray, the Glens Falls agent?

A. The only time I discussed Duque & Frazzini was when I made the contract.

Q. I don't mean the Pioneer plant; I mean the P.D.O.C. plant?

A. Yes, sir, we discussed that the early part of May.

Q. With whom?

A. Mr. Bray, Mr. Frazzini, Mr. Duque, Eddie Earl.

Q. Who was Eddie Earl?

A. P.D.O.C.; and Mr. Kovich. Mr. Bray came in Tucson in the early part of May. He stopped at the Pioneer Hotel. I was staying at the Santa Rita. He called me. I asked Mr. Bray to come and have breakfast with me at the Santa Rita, which he did. He asked me if I was going out. I said yes, but I have no transportation, so he took me.



(Testimony of Nickola L. Basich.)

He took in Duque & Frazzini's office there, and later on he came into our office. He asked all the questions about the cost, and everything, which I told him just exactly what it was; that the cost is exceeding their production, and Mr. Bray and Homer Thompson, I am sure they spent two or three hours looking things over there. Mr. Bray stayed a couple of days. I told Mr. Bray, "Why don't you set up a plant? It is impossible for them to supply the material and finish the job in time, which was very urgent with the B 49 Base.

He asked me what could be done. He asked me if there was a plant in the neighborhood that could be got. I told him about the P.D.O.C. plant. He talked to Duque & Frazzini. He came back again, and he said to me, "Nick, they can continue with the work where they are. They owe around \$20,000.00 worth of bills, and they haven't got the money to pay them."

Q. Who told you that?

A. Mr. Bray. Then he asked if I couldn't advance them \$20,000.00 so that they could proceed and finish the job. I told Mr. Bray, "No, I can't advance the money, but I can rent them the plant and charge them, if satisfactory." So we checked in and got prices from Eddie Earl.

I don't think Bray was at the meeting at our office when Eddie Earl came. Then Duque & Frazzini came. I was there about an hour and a half. They gave us some prices, and when I left they were still talking.

(Testimony of Nickola L. Basich.)

When I got in the hotel I had my dinner. About 11:00 o'clock George called me up—George Kovick, and said, "Nick, when we left the office I tried to call you up, but I couldn't get you; your room did not answer. Later on, just a few minutes ago, Mr. Duque called, and he said, 'Yes, we will take that plant if you pay for the moving in and out, \$2,500.00.' "

I told George to call Duque and tell him I am not going to pay anything of the kind; it is up to them to produce the material, and get sufficient equipment to do so.

Q. Later on Basich Brothers made arrangements with P.D.O.C. for that plant?

A. Some arrangements.

Q. When was that plant put in operation, the P.D.O.C. plant?

A. The first part of June, around the 5th to the 8th; something like that.

Q. At that time had Duque & Frazzini been producing sufficient material for you to carry on your operations at the main base?      A. No.

Q. Were you compelled to suspend your operations at any time at the main base because of lack of material being produced by Duque & Frazzini?

A. Yes.

Q. Do you know whether or not there were available material on the Gollobs property, aside from any material back of his barn, that could have been produced to carry on operations?

(Testimony of Nickola L. Basich.)

A. Sure, there was enough to supply another base like that.

Q. Did you take any material at the spot indicated by Mr. Wollums in his testimony, where he stated Duque & Frazzini wanted to move the material?      A. No, I couldn't.

Q. Did you?      A. No.

Q. Did you have any arrangement, or discussion, with Mr. Duque or Mr. Frazzini as to where he should not remove any material, before the contract was signed?      A. Yes.

Q. What was said in that respect?

A. Mr. Frazzini came on the job first, which was around the 10th or 11th, whatever it was. I was on the job, and I took Mr. Frazzini on the property owned by Mr. Gollob, and told him how far he could go close to the house. There was a previous pit in there showing good rock on that side next to the house, which Mr. Gollob would not let me touch, and when he leased it he showed me how far I could go to get material. So I took Mr. Frazzini and showed him exactly the lines where Mr. Gollob agreed to let me have it. I told him he can't go outside of those lines.

Q. Was the point where Duque & Frazzini were planning to remove the material about May, 1945, beyond the line indicated?      A. 150 feet.

Q. Beyond that line?      A. That's right.

Q. Mr. Basich, have you had numerous conferences with Mr. John Bray of Glens Falls Indemnity Company, while Duque & Frazzini were operating?

(Testimony of Nickola L. Basich.)

A. I think that is in the deposition, except one time.

Q. You have to testify?

A. Yes, except one time Mr. Bray came in our office.

Q. When was that?

A. Oh, that was between the 20th and the 1st of May.

Q. The 15th or 20th of April?

A. And the 1st of May. Sometime in April. I don't know the time. He called up and wanted to come and talk to me about it, after he received the letter.

Q. He came to your office?           A. Yes.

Q. What discussion did you have?

A. He asked me how things were going out there. I told him what I thought, and told him the best thing for them was to do something about it. He promised me he was going to take a look at it.

Q. After you had this meeting at your office, did you meet Mr. Bray at Tucson?           A. Yes.

Q. How many days did he spend there?

A. Two or three days. It's in the deposition.

(Short recess.)

Q. (By Mr. Monteleone): Mr. Basich, during the operations of Duque & Frazzini did you or anyone connected with Basich Brothers, to your knowledge, ever hire or fire any of the men working on the Duque & Frazzini operations?           A. No.

(Testimony of Nickola L. Basich.)

Q. Or did you, or any of your men, make any attempt to hire or fire any of these men?

A. No.

Q. Referring to Article XXIII, Item 11 of the subcontract of date February 7, 1945, Plaintiff's Exhibit 1, it is specified therein, 9,000 cubic yards of gravel for stabilized sub-grade under gravel base. It is already stated that measurements are to be computed on truck water level. Do you remember that provision? A. Yes.

Q. The measurements, so far as the Bill of Particulars shows, are according to cubic yards?

A. Yes.

Q. Will you state why it was measurement was made in connection with this item on the basis of cubic yards rather than truck water level?

A. Truck water level means the truck full of material. In the bunker you have a hole 12 inches by 12 inches, and you load the trucks which have a body consisting of 6 feet in width up to 7 feet in width, and a difference in length, and when you dump it in the middle you can have water level. So you have to have two men level the trucks up, and he has got to make a truck full, and for every truck full he gets paid for it, and Duque & Frazzini, they did not want to do it; they did not like to do it; and he asked could they be paid any other way. I told him yes, he could be paid the other way. The specifications call for 2 inches thick, which would be a benefit to him. There was more waste with 2 inches thick lying loose on the ground

(Testimony of Nickola L. Basich.)

than in the truck. Therefore, he gets the benefit of it; but it was such a small amount we were willing to pay that difference, if satisfactory, to save him money. There was at least a quarter to one-third he got paid for that never had been hauled to the job.

We had sections on that job which they called the turning apron, where the B 29 turned, consisting of 3 inch plant mix with 6 inch crusher or base, to be removed, and the dirt to be excavated for every runway. On these places we favored the crusher run as much as possible, and used it in connection with the 2 inch stabilized base, for which Duque & Frazzini got paid.

Q. Mr. Basich, the change in the measurement from water level to cubic yards was at the suggestion of Duque & Frazzini? A. That's right.

Q. It was for their benefit?

A. It was for their benefit.

Q. In your opinion were they given a greater amount or quantity by computing on a cubic yard basis than a water level basis? A. Yes.

Mr. Monteleone: That is all.

#### Cross-Examination

By Mr. McCall:

Q. Mr. Basich, you say that you had a conversation with Mr. Frazzini regarding the change in the calculation of this material mentioned in Article XXIII, Item 11 of the subcontract?

A. Yes.

(Testimony of Nickola L. Basich.)

Q. When did that conversation take place?

A. Oh, that conversation took place around the 23rd or 22nd; something like that; of February.

Q. The 23rd or 22nd of February, 1945?

A. Yes.

Q. And he agreed with you that he would change the calculation, and instead of paying on water truck level, that you would pay on another basis?

A. He wants me to save two men every day on the plant, plus one man making the trucks.

Q. So to that extent you and Mr. Frazzini changed the subcontract?

A. Well, we didn't change the subcontract at all; the measurements only.

Q. Did you ever keep a record of the truck loads as required by the subcontract, after that?

A. I don't know if they did or not.

Q. Now, Mr. Duque, if Mr. Frazzini stated in his deposition, reading from page 111, at line 23:

“Q. Well, I'll show you the schedule 39 in this Bill of Particulars, copy of which counsel has before him, and ask you if you had any contract or agreements with Basich Brothers after the signing of your subcontract to calculate that material otherwise than is stated in the subcontract.

“A. No, not to my knowledge.

“Q. You will note the subcontract calls for 40 cents a cubic yard and the material has been added up in square yards, and then re-

(Testimony of Nickola L. Basich.)

duced to cubic yards. Do you know on what basis, what reason that was done?

“A. No, I don’t.”

If Mr. Frazzini testified to that, do you still contend that you did have such an agreement with him as you mentioned? A. Surely.

The Court: Well, the fact remains, however, whether you did have an agreement, or did not, the settlement was made upon that basis?

The Witness: A different basis, yes.

Q. (By Mr. McCall): Then, Mr. Basich, you said something about Mr. Bray told you that Duque & Frazzini needed \$20,000.00 to continue. I did not understand all you said about that. Will you tell me again?

A. Mr. Bray told me that they needed \$20,000.00 to continue with the work and produce the material.

Q. When did this conversation take place?

A. The first part of May.

Q. Where was it?

A. At Tucson, at the Base.

Q. Who was present?

A. I don’t know if anybody was present.

Q. Did he tell you how he calculated Duque & Frazzini needed \$20,000.00?

A. Duque & Frazzini told him that they needed \$20,000.00.

Q. That is what he told you?

A. That is what he said. He told me that they owed \$10,000.00 to the bank in Reno.